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THE HINDU LAW OF IMPARTIBLE PROPERTY INCLUDING ENDOWMENTS

BY

JOGENDRA CHUNDRA GHOSE, M.A.B.L., M.R.A.S.,

Author of the Principles of Hindu Law, Editor of the English Works of Raja Ram Mohun Roy, Member of the Legislative Council of Bengal, for sometime Representative of the Faculty of Law in the Syndicate of the Calcutta University, Pleader of the Calcutta High Court, Member of the Asiatic Society of Bengal, &c.

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property in land was unknown to antiquity ; all land was common property."* We have traces of this state of things in the laws of Manu. Among the Romans also, for many centuries, community of property in pasture land was maintained." Impartibility was the original law. It is a very interesting history how the pastoral Aryans became an agricultural people and wi the spread of agriculture, came naturally t law of partibility of land.

The early Aryans were a nomadic peopl In Sukta 42 of the first Mandala of the Rig Veda we find the following prayer: "Take us t beautiful grassy country. May we not get an trouble on the way."† It shows the mode life the early Indian Aryans led. The ear Greeks were also described as nomadic by Thuc dides. Strabo speaking of Germany, says "com mon to all the inhabitants of this land, is thei readiness to migrate, a consequence of the simplicity of their mode of life, their ignorance of agriculture in the proper sense and their custom, instead of laying in stores of provisions, of living in huts and providing only for the needs of the day." Indeed the sweet word "father land" had no attractive sound for the primitive man, nor did it acquire it until a

* See Evolution of the Aryan, by Ihering, p. 14. See also De Laveleye's Primitive Property (1878).

† अभिसूथवसं नय न नवज्वारोअध्वने ।

territorial basis was supplied to the political unit in place of the tie of kin. How was the change effected and what were the institutions with which the migratory tribes parted with one another? Here the wonderful and truthful history contained in words found by the genius and industry of modern scholars comes to our help.

We find the word Viç, and Vispati common to all the Aryan nations. Sanskrit Viçpati, Teutonic Viçpati, Zend Vespaito, Lithonian Wieszpati, Slav Viszpati, Pruss Waispathin* show that the Aryan nations were divided into Viçes or tribes and had Viçpatis or leaders of tribes. "In the Rig Veda, Viç as it seems, frequently means a combination of several Sibs. The individual Sib as a settlement, is called *grama* and *Vrjana*, as a community, *Janman*."†

"The tie which connected the people was very loose. They were gathered into tribes (Jana) ruled by princes (Rajan); the tribes were divided into provinces (Viç), and these again into villages (Grama)."‡ But there was no bond of union between the tribes to bind them all together into one political whole. The tribe was the highest political unity. Only in time of danger

* Biographies of words and the home of the Aryas by Max Muller.

† Pre-historic antiquities of the Aryan peoples by Dr. O. Schrader, p. 394. I do not find the word Janman in the Rig Veda. Probably it is a mistake for Jana.

‡ Ihering Evolution of the Aryan, p. 25.

did one tribe combine with its nearest neighbours. Each tribe would have its elder or chief, and above all the combined tribes would be the Viçpati whose office became in course of time hereditary. Sir Henry Maine says that the election of an elder to be head of the Sept was based on the custom of the election of a patriarchal "house-father" in a joint family and as the chiefs of tribes sank into the position of nobles and were succeeded by their eldest sons in the possession of their offices and demesnes, a similar rule might grow up with regard to the king. And he further says that the eldest son succeeded "for reasons connected with the priestly character of the king." But though there may have been some custom in Rome, in India whether in the Vedas or in the Smritis there is no trace of the priestly character of the king. He was never regarded as the owner of the soil and the character of his office is very clearly and minutely described by Manu and the other law-givers as we shall see hereafter. Dr. Ihering says that "the two ideas of the family and of the Sib are based on the notion of the power of the father over his children: the former consists of the free persons under the authority of a living ascendant, the latter of those free persons who would have been under such authority had no death taken place. 'The mark of the Sib is the *nomen gentile*, the name

of the common ancestor."* This state of things we find continued among the Romans, Greeks and Germans. Among the Romans and the Greeks we know how the idea of the modern absolute king was very disagreeable. Tacitus reports of the Germans that among them "there were no kings but the familæ and propinquitates fought together in battle." The *Principes* of the Teutons and the Celts, according to Tacitus and Cæzar, had no position in the government at all. They were merely distinguished by their wealth, birth or influence, which advantages however were often stepping-stones to the kingship. "In the Vedic period—and we may accept the same for the Aryan nation—each tribe stood under a king (Rajan) appointed by election who in time of war had the chief command. He was *Satpati, i. e.*, leader in the field. The king did not stand at the head of a nation but of an army; he was the king of the army, not of the nation, the same as Herzog of the Teutons who had "to lead the army." Therefore his authority was unlimited in all military concerns; he had power over life and death."†

Now when the Aryan nations migrated to the west to Europe and to the south to India, the king of the Teutonic and Roman nations, as well as of the Indians, was not the king of the

* Ihering's Evolution of the Aryan, pp. 322, 324.
† Schrader, p. 398.

mother nation. "He was the commander-in-chief of the migration."

In those times of wandering the people and the army were one and the clan-lord or *Reg* or *Rajan* became the commander *Satpati* or *Voge-voda.** It was in those times that the reins of regal or princely power were drawn tighter. When a country was conquered, the different bodies of settlers divided the land into townships or districts bearing the main features of the Aryan Sib. Probably a large district was allotted to the leader as his domain and smaller districts to the king's immediate followers.† The king was however never regarded as owner of the soil.‡

In India and Persia, we find a peculiar state of things which also probably prevailed among other ancient Aryan nations. In both countries, the Aryans were divided into three castes, the Brahmans or Atharvans, the Kshatras or Kshatriyas and Vaisyas or Vaisus. In Persia, the Atharvans mainly lived by performing purificatory ceremonies. "The Kshatriyas were a kind of rural gentry composed of the most opulent landlords who could entrust to their servants the management of their estates and had sufficient leisure

* Ihering, p. 324.

† Digby's History of the Law of Real Property, p. 10.
Stubb's Constitutional History, Vol. I, pp. 64, 72; see also Kemble's Saxons in England.

‡ Schrader's Pre-historic Antiquities.

to exercise themselves in the use of arms." In Persia, the Vaisyas were a servile class.* In India, the Brahmins also seem to have been a warrior caste, as appears from the ancient marriage mantra by which the bride is blessed with the blessing of being the mother of a hero. When however they left off martial pursuits, they became very like the Persian Atharvans but they had large grants of lands made to them by the kings upon which they lived, and over and above that, by custom one-thirtieth of the produce was supposed to be due to them, as Parasara says.† The Kshatriyas were all Rajanyas. They were prohibited to carry on cultivation. Their main work was declared to be the profession of arms and the protection of their subjects. From this description, it appears that they were very like their brethren in Persia, and all of them occupied the position of subordinate chiefs. The Aryan conquerors of India lived surrounded by herds of cattle and many slaves, as appears from a Rik which asks for "a hundred asses, hundred sheep and hundred slaves."‡ In troublous times of the first

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* Civilization of Eastern Iranians in ancient times by Dr. Wilhelm Gieger, p. 64.

† राज्ञे दत्त्वा तु षट् भागं देवानाञ्चैकविंशकम्।
विप्राणां विंशकं भागं कृषिकर्त्ता न लिप्यते॥
Parasara, Ch. 2, V. 14.

‡ शतंमे गर्दभानां शतमूर्णावतीनां शतंदासा अभिषज:। Rig Veda 8, M. 56, S. 3.

conquest of India, it is possible that land was held by all Kshatriyas in military tenure. However that might have been, the system described in the Mahabharata (Santi Parva, Ch. 87, v. 3-8) and by Manu was as follows. "Let him (the king) appoint a lord over each village as well as lords of the villages, lords of twenty, lords of a hundred and lords of a thousand. The ruler of the villages shall enjoy one *kula* (as much land as suffices, for one family), the ruler of twenty, five *kulas* the ruler of a hundred, one village, the lord of a thousand, one town." (Manu, Ch. VII. 115-119.) Then again, Ch. IX. 272 speaks of officers appointed to guard provinces and vassals ordered to help them. The land was cultivated by the Vaisyas who according to the old Persian records were a servile class of Aryan origin but who in India were free men, who by rearing of cattle, cultivation and trade became very opulent and mostly lived in towns having many slaves themselves.* The Sudras were the aboriginal inhabitants of India regarded as slaves who enjoyed personal freedom, though many of them belonged to some master.

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* In the Mahabharata, however, we find the Vaisyas mentioned along with Sudras as classes about whom it was doubtful whether they were governed by the Vedic Laws as the following verse shows :

ब्रह्मचेदे प्रसूताश्च वैश्याः शूद्राश्च मानवाः ।
कथं धर्मानवरिष्यन्ति सर्व्वे विषयवासिनः ॥
(शान्ति पर्व्वणि, ६५ अ १४, १५)

It is surprising how the Salic law agrees with the law of Manu in this matter. The Salic law speaks of (1) Freeborn persons (ingenuus Francus, Salicus Francus) with a wergeld of 200 solidi ; (2) Serfs (leti or liti) who enjoyed personal freedom though belonging to some master and (3) Pueri regis (probably serfs in the service of the king.) The chief of the state was a king. His officers included the *grafio* who was chief of a *pagus* (shire) ; Sacebaro, chief of a hundred (both with a wergeld of 600 solidi). In India as in other countries, most of these offices became hereditary. We have thus petty chieftainships and officers of the king having land attached to their offices. Were these estates always impartible ? It is a difficult question to answer.

Sir Henry Maine mentions of an old Celtic custom by which there was a "portion of land attached to the Seignory or Chiefry which went without partition to the Tanaist" or the chief of a clan under the system of tanistry. A custom like that probably prevailed among all Aryan nations and made the introduction of feudalism in Europe easy.

There was a maxim of feudal law in Europe that certain dignities and offices, castles required for the defence of the realm and other inheritances under the "law of the sword" should not be divided. But this maxim cannot be traced back before the 10th or 11th century A. D.

It is supposed that among the Germanic nations the feudal system did not originally prevail. They adopted it from the Roman system of quartering soldiers upon frontier lands on condition of their rendering services when called upon in the defence of the frontier. Probably the conception of the tenure under which these soldiers held their lands was borrowed to some extent from the attributes of the interests in land called *emphyteusis*. Though the *emphyteuta* (the person having the right) had an indefinite power of enjoyment and alienation, *emphyteusis* was nevertheless regarded as a *jus in re aliena* as a right distinct in kind from the *dominium* or property in land which was considered to be retained by the grantor. The barbarian settlers upon Roman territory seem to have been brought under the influence of these legal ideas, and a curious blending of them with the old Teutonic customs gave rise to the feudalism of Europe. The *principes* became the lord and *comes* the feudal tenant, subject to the condition of rendering military service. But the impartibility of such tenures was of later origin.

In France, the crown itself was regarded as partible inheritance under the first two dynasties. In the beginning of the 11th century, primogeniture had become the rule as to fiefs, offices and dignities, and partly no doubt from analogy and partly from reasons of public policy, the

crown was brought within the same rule under the house of Capet.* As regards fiefs, they were regarded as partible until A. D. 1138, when Emperor Frederic Barbarossa for reasons of public policy forbade the greater tenancies to be subdivided. The Assessi de Jerusalem had laid down the same rule in 1099, though the king was allowed to select any one of the children for succession. In Brittany, primogeniture was not introduced till 1185 even for nobles and knights.†

In India also, we find from the Puranas that in early times, kingdoms were sometimes partitioned.

From what has been stated above, it seems probable that inalienability and impartibility were two of the incidents of property in land among the ancient Aryans on account of the joint family system that prevailed among them. But when we come to authentic history we find that among the Greeks, the Romans, the Britons and the Saxons, equal partition of land among the sons was a well-established rule.‡ Only in Scandinavia the strict rule of primogeniture prevailed. In England and some other European countries, on account of the introduction of the feudal system, impartibility of land again became

* Montesquieu Spirit of Laws, XXXI 32.

† Kenny on the Law of Primogeniture in England, p. 4.

‡ Stephen's Blackstone, vol. I, p. 404.

the rule,* with the modification that according to ancient Aryan custom, the family was the owner of the property, the eldest being only the manager, but under the feudal system the eldest became the owner. Now we go to the law as we find in the Hindu Smritis.

It appears that in ancient Aryan Society, the *Pater-familias* represented the family in all matters religious, social or political. He alone was clothed with legal rights and burdened with legal liabilities. On the death of the *Pater-familias*, the law had to determine on whom his *persona*, *i. e.*, the aggregate of his political and social rights and duties should devolve. Latin *persona* means the same thing as Sanskrit *Atman*. The ancient Hindu thought that the son was one's own self reproduced. On the eldest son naturally, and by the said fiction, the duties of a man and also his rights devolved. He represented the family. This was the origin of the law of primogeniture, as found in the old Smritis. In after times, when the position of the *Pater-familias*, which was like that of a

* See Palgrave's Rise and Progress of the English Commonwealth, vol. I, p. 495 for a full account of the causes which led to feudal tenures in England. See also Stubb's Constitutional History, vol. I, pp. 264, 152, 157. Freeman's History of England, vol. I, p. 92. Digby says on this matter: "there can be no doubt that tenure in Socage is the successor of the alodial proprietorship of early times. The chief characteristics of Socage tenure were, (1) on the death of tenant in Socage, the land, if "antiquitus divisum" descends to all the sons. This was the case in Glanville's time but under the influence of Norman lawyers, the rule of primogeniture had become general in the next century, except in the case of the Kentish tenure of Gavelkind and in other localities where special ustoms retained their hold."

feudal lord, became less important in the body politic, with the growth of the power of the King, the rule of primogeniture fell into disuse, except in the case of principalities and feudal chiefs and persons holding hereditary offices.

The old law according to the Rishis was, that the eldest son alone was entitled to the inheritance, subject to the duty of maintaining his brothers. The idea got hold of the Indo-Aryan mind that the son saved the father from hell, and took upon himself the debts of the father, temporal and spiritual. It was also a very ancient idea among Aryan nations that the son was liable for the worldly debts of the father to his creditors. The *Sui heredes* under the old Roman Law had to satisfy the creditors of the deceased, whether the inheritance sufficed or not. The payment of debts somehow or other was considered an urgent duty, and the ancients had an idea that debts followed a man after death, and probably dragged him to hell. By the birth of a son alone could a man be free from the danger, for he left a substitute, and the debt then devolved on the son. The idea never lost its hold over the Hindu mind, and hence we find that according to the Rishis, it is an obligation, legal, not moral only, of the son to pay the father's debts. This liability of the son to pay the father's debts was amplified into the spiritual obligations of the Brahmin, namely, the debt to

the ancestors to beget a son, the debt to the Rishis to study the Vedas, the debt of sacrifice to the Gods and the wordly obligation to pay the father's debts. "The son is made a substitute for the father for meritorious works," say the Vedas. The Sraddha is a debt of the father devolving on the son and is also a debt of the son himself. The idea that the son was under a liability to pay the worldly debts of the father must have preceded the idea of his obligation to perform the Sraddha, for in the most ancient books we have got, the sons liability to perform the Sraddhas wherever it is mentioned, is called a debt (ऋण) by analogy to temporal debts.* The son, grandson and great-grandson and daughter's son were the only persons who were under an obligation to perform the Sraddha and to pay his other debts under the Hindu law, whether they received any property or not, as under the old Roman and Greek Law, the direct descendants were bound to perform the funeral ceremonies and to make offerings to the ancestors and to pay their debts, whether they received any property from them or not. By the birth of the first son, it was supposed by the Hindus, a man was freed from all these debts. Therefore he alone was entitled to the inheritance, the others

* Many learned authors have fallen into the error of considering the Sraddha as the basis of all rights of the son, on account of imperfect information on the subject as will be apparent from the above.

being entitled to be maintained. Probably it was a remnant of some custom of primogeniture prevailing among ancient Aryans based upon the prevailing joint family system which required one head or lord, called Prabhu, in the Hindu Smritis. The injustice of the rule became very soon apparent to the reasonable mind and the just instincts of the Hindu race, and the law was slowly changed, and the partition of family property was ordained. At one place both Manu and Gautama give to the eldest the entire inheritance. In other texts Manu gives to the eldest one-twentieth, Gautama gives either two shares or one-twentieth more, Vashistha gives the eldest son two shares, Baudhayana gives one-tenth more or the horse or the cow. Apastamba set his face against this unequal division, and abolished the custom of the eldest son's extra share, and ordained that he should be given some particular article as a mark of honour. In Buddhistic times, the eldest son's extra share was recognized as will appear from the Burmese Manu, and was put down at
1 one-tenth. The custom of giving an extra share to the eldest son prevailed, it seems, among all the Aryan nations. It existed among the old Persians. In ancient Germany and France also, this custom of giving a preferential birthright to the eldest son was recognized, and in the latter country it was called "le preciput." The eldest son or the eldest child got the house and a piece

of furniture and a piece of land "as far as a chicken could fly" as being traditionally exempt from partition. Under the Athenian law, as Demosthenes tells us, the house went to the eldest son. In India, the custom was reprobated by Apastamba and prohibited in rather recent times by the Aditya Purana.

We thus find how slowly the right to partition was established among Hindus. When it was established, and that was before the Narada Smriti and probably the Manu we have got, were written, and before the words Daya and Dayabhaga came into use, the one question on the matter of inheritance which the lawgivers discussed was Dayabhaga or partition of the paternal property (see Narada Ch. 13 V. I.)*. The word Daya is derived from the root *Da* and originally meant gift. We find also a text of the Veda, which is cited as the authority for the right to partition of younger sons, to the effect that "Manu divided his wealth among his sons." And we find also texts in all the Smritis about partition during the father's life-time. All this tends to show that the ancient Law was, that without a disposition *inter vivos* by the father, the eldest or the most capable among the sons took the entire inheritance as Prabhu or lord of

* विभागोऽर्थस्य पित्रास्य पुत्रैर्यत्र प्रकल्पते ।
दायभागइति प्रोक्तं तद्विवादपदं बुधैः ॥ नारद १३ अ० १ ।

† Sec. 11. I. A., p. 145.

the family. As a rule the eldest took. But ancient texts show that when the eldest was not a capable person, the most capable among the brothers took the father's place. We find a curious custom among the Celtic Irish, according to which succession was determined by a system of nomination and election combined. † The custom is probably a survival of a very ancient Aryan rule. However that may be, the text of the Veda mentioned above and the old Smritis go to show, that the partibility of property owed its origin to the natural affection and sense of justice of the father, who to secure the rights of younger sons, made it a point to divide his wealth during his life-time, giving an extra share to the eldest son. In course of time this practice led to the recognition of two very different rules: first the rule of the right of sons to demand partition during the father's life-time; second, the rule that all the sons were entitled to shares on partition after the death of the father. The above will not be wholly intelligible, if it is not remembered here, as mentioned before, that in ancient society brothers, for mutual protection against others could not afford to separate from each other and that jointness was the normal condition and also that it was an idea of the ancients that father and son were one person and that the son had thus an equal right with the father in ancestral property.

Now when the custom of partition was established, certain properties were declared as impartible. Manu says "A dress, a vehicle, ornaments, cooked food, water and women, property destined for pious uses or sacrifices, and a pasture ground they declared to be indivisible." The ancient law-givers Sankha and Likhita say: "No division of a dwelling takes place, nor of iron-water-pots and ornaments, nor of women and clothes enjoyed by one, nor channels for drawing water. Prajapati has so ordained." Harita says, that the family-god and the dwelling house should be taken by the eldest son. Katyayana agrees with Manu and adds to the list, carriage, books and implements of arts. Katyayana cites the authority of Vrihaspati for the rule. But the text of Vrihaspati we have got, lays down a very different proposition. It thus appears that the Vrihaspati we have got is a later edition of the book which Katyayana had before him. More advanced legal ideas prevailed during the time of the compilation of the present Vrihaspati, and we find him declaring every property considered indivisible by ancient law-givers as divisible and laying down that what is incapable of physical division should be either sold and the sale proceeds divided or the whole should be enjoyed by turns.

Now from the above it is clear that properties which are now considered as impartible,

do not fall in the list of impartible things mentioned in the Smritis or the Commentaries, excepting perhaps property dedicated to religious uses as to which there is considerable doubt.* According to Vrihaspati, every thing is divisible. Most writers on Hindu Law have fallen into the error of considering Rajes and Muths as included in the category of indivisible or *Abibhajya* things mentioned by the commentators. It is on account of this error that it was repeatedly decided in our Courts, for nearly a century, that Rajes might be joint-family property in which the son had such right by birth as to entitle him to prevent an alienation by the father. It is only recently that the Privy Council have corrected the error. It has also been repeatedly laid down that a brother might take a Raj by right of survivorship—a proposition the correctness of which will be fully considered in its proper place.

By impartible property with which we are mainly concerned, should be understood property which by its very nature, must be taken by one. A principality cannot be taken by two, nor can the office of the head of a religious endowment be held by more than one. As property which is impartible is very often inalienable, so property

* There is a divergence of opinion about the meaning of the word Yogakshema which is suppossed to mean religious uses, mentioned by Manu, which is very important and which will be considered in its proper place in the chapter on endowments.

which cannot be alienated is very often impartible. Thus property which is dedicated for religious or charitable purposes is impartible. Property which is attached to an office that can be held by only one is also impartible. Feudal tenures of which we have got many instances in India are impartible. Last of all, property dedicated to a God is the property of one who neither dies nor leaves successors behind him, and is consequently impartible.

Now it will be observed that in the case of principalities, the king is master of all things within his realm and cannot be said to hold property as against his subjects. He is above and beyond the law applicable to others. According to Hindu ideas, he is a divine person, whose office is to protect the weak against oppression and to enforce the divine law as declared in the Smritis or by the assembly of holy men. Every act of his life had to be regulated by the express rules of the Smritis. His was a divine office and he was never considered in the light of an owner of property* in the legal sense. The Mimansa makes it very clear. The position of the Mimansists is thus stated by Mr. Colebrooke: "A question of considerable interest, as involving the important one concerning property in the soil of India, is

* Jaimini, 6-7-2.

discussed in the sixth lecture. At certain sacrifices, such as that which is called *viswajit*, the votary, for whose benefit the ceremony is performed, is enjoined to bestow all his property on the officiating priests. It is asked whether a paramount sovereign shall give all the land, including pasture ground, highways, and the site of lakes and ponds; an universal monarch, the whole earth; and a subordinate prince, the entire province over which he rules? To that question the answer is: the monarch has not property in the earth, nor the subordinate prince in the land. By conquest kingly power is obtained and property in house and field which belonged to the enemy. The maxim of the law, that the king is lord of all excepting sacerdotal wealth, concerns his authority for correction of the wicked and protection of the good. His kingly power is for government of the realm and extirpation of wrong; and for that purpose he receives taxes from husbandmen, and levies fines from offenders. But right of property is not thereby vested in him; else he would have property in house and land appertaining to the subjects abiding in his dominions. The earth is not the king's, but is common to all beings enjoying the fruit of their own labour. It belongs, says Jaimini, to all alike. Therefore, although a gift of a piece of ground to an individual does take place, the whole land cannot

be given by a monarch, nor a province by a subordinate prince, but house and field acquired by purchase and similar means, are liable to gift."*

The above principle of law was accepted also in Europe. Lord Brougham made the following observations on this matter: "I must beg to enter my protest against the distinction which has been taken as to the prerogatives of the crown being different, where the crown is supposed to be dealing with what is called private and individual property and public property. The prerogative of the crown is precisely the same as regards what is called the property of the Sovereign and the property of the public. It is only within the last half century that any private property has been acknowledged to exist in the crown at all. Prior to that all lands descending to the crown from ancestor or collaterals were held *Jure Corona.* All property of the crown is held for public purposes and is crown property; it is public property which the crown administers for the maintenance of the state "† The Privy Council also held that no distinction exists between public and private property of an absolute Sovereign‡. In another case, their Lordship of the Privy Council make the

* Celebrooke's Miscellaneous Essays, p. 345.

† The Lord Advocate *v.* Lord Douglas, 9 Cl. and F. M. 211. See Comyn's Digest.

‡ The Advocate General of Bombay *v.* Amir Chand, 1 knapp P. C. cases 329.

following observations : " But then it is contended that there is a distinction between the public and private property of a Hindu Sovereign and that although during his life, if he be an absolute monarch, he may dispose of all alike, yet on his death, some portions of his property, termed his private property will go to one set of heirs and the Raj with that portion of the property which is called public will go to the succeeding Raja. It is very probable that this may be so"*. The correctness of the proposition will be discussed in another chapter. Sufficient for our present purpose is to mention that the principle that crown property is not the personal property of the king is an ancient principle enunciated by the old Rishi Jaimini, which had prevailed among all Aryan nations and which they carried with them to the countries to which they migrated.

The head of a religious institution and the Shebait of a religious or charitable institution can, in the very nature of their office, have no right of ownership, in the endowed property.

As to the property held in military tenure or as ghatwali and the like, strictly speaking, it is property attached to an office. Such also is the property of a Polygar who in many cases was originally a feudal lord, and of the holder of a Vatan or Vantandar. In some of these cases,

* Secretary of State *v.* Kamach Boyee Saheba, 7 Moore 530.

it has been held that the holder of the land must prove custom, to defeat a claim for partition. But it must be said that instances of this kind are rare and occur only on account of peculiar circumstances.

Royal grants of revenue for service, such as Jagirs or Saranjams in Bombay, are also impartible. But it is not true that whenever land is attached to a hereditary office, it is indivisible. In Bombay, there are numerous revenue and village offices, such as *Deshmukh*, *Daspande*, *Desai* and *patel*, which are remunerated by lands originally granted by the State. These lands are as a rule impartible but some of them have by lapse of time come to be considered as purely private property of the families which hold the offices, though they are subject, to the obligation of discharging the duties and defraying all necessary expenses, and on partition, a portion of the property is set aside, (as in some cases of private endowments) sufficient to provide for the discharge of the duties and the rest becomes ordinary, private partible property. It has been held that the discontinuance of services attached to an estate does not alter the nature of the estate and render it partible. It is a question of some difficulty whether the discontinuance of service will render the land liable to resumption. The Chakran tenures in Bengal which are of this nature have been the subject of much

litigation. This is not the proper place to discuss these matters in detail. Sufficient has been said for our present purposes.

It will thus be seen that properly speaking, all impartible property, according to later Hindu jurists, is property attached to an office. The property of the King and of a God is not property in the strict legal sense. But holders of impartible Zemindaries which were originally principalities have come to regard themselves as owners of their estates and holders of military and other service tenures also have, like the feudal lords of Europe, come to be considered as proprietors of the lands held by them.

It is very often thought that a thing which is impartible is also inalienable and what is inalienable is also impartible. As to the former, the Privy Council have held that what is impartible is not necessarily inalienable and until inalienability by custom is proved, it is alienable. It will be observed that most of the things declared not partible by the Hindu lawgivers are alienable. They are however mostly moveable. The Hindu lawgivers speak of inalienability only in connection with land. In ancient times, among Hindus, land was inalienable but it was liable to partition among the members of the family to whom it belonged. But it was not wholly inalienable. It was alienable by or with the consent of the entire family. An entire principality was always impartible.

This inalienability of land was an incident of the ancient custom of holding land by village communities. Sir Henry Maine in his brilliant book, has made the idea of village communities familiar to every body. Mr. Metcalfe's graphic description of it has formed the basis of an oft quoted noble poem. But Mr. Mayne on this question says :—"The ancient Hindu writers give us little information as to the earlier stages of the law of property. So far as property consisted in land they found a system in force which had probably existed long before their ancestors entered the country, and they make little mention of it, unless upon points as to which they witnessed or were attempting innovations. No allusion to the village coparcenary is found in any passage that I have met. Manu refers to the common pasturage and to the mode of settling disputes between villages, but seems to speak of a state of things when property was already held in severalty. But we do find scattered texts which evidence the continuance of the village system, by showing that the rights of a family in their property were limited by the rights of others outside the family." Mr. Mayne apparently disagrees with Sir Henry Maine and his followers. Now, if we are to go to a time anterior to Manu for evidence of the existence of village communities, we must be on very uncertain ground. Let us

find out and tread on the firm land of history and authentic record in ascertaining the truth in the matter.

It is not true that the Aryans when they came to India, left the land system as they found existing untouched. The Aryan conquerors always carried their own institutions with them. In the beginning probably, the Spartan system prevailed in India and the land was cultivated by the servile classes. In India, land was cultivated by the Vaisyas and the Sudras. Brahmans and Kshatriyas would not and could cultivate the land. They lived on the produce of it. We find mention in the Pali books written 300 years before Christ, of *Brahman-gramas* or villages of Brahmans. We also read of Shashanas of Brahmans in the old Smritis. These were grants made to Brahmans by kings. The Sashanas still exist all over India. The village belongs to a Brahmin family. There are barbers, washermen, carpenters, musicians and other necessary artisans settled on the land enjoying lands granted to them, and serfs cultivating the land. The rights and privileges of all are determined by immemorial custom. Thus there were Kshatriya villages. In Bengal, when Brahmans and Kayasthas were brought by Adisura, they too were granted villages in this fashion. Every Aryan family had slaves or serfs attached to it, as appears from the Vedas, and we find family

slaves mentioned in the ancient marriage ceremony described by Gobhila. The Vaisyas latterly mostly lived in towns engaged in trade and commerce but even so late as Kalidas's time the villages were mostly inhabitated by Sudras. That great poet also describes villages granted to Brahmans.

The aboriginal Sudras were governed by their own system and the Aryan settlers by the system necessitated by the conditions under which they were living on the land. This was the old state of things. In the Punjab, we find a system of holding land which is known as the communal Zemindary system. Under this system "the land is so held that all the village co-sharers have each their proportionate share in it as common property, without any possession of or title to distinct portions of it; and the measure of each proprietor's interest in his share is fixed by the customary law of inheritance. The rents paid by the cultivators are thrown into a common stock, with all other profits from the village lands and after deduction of the expenses, the balance divided among the proprietors according to their shares." This state of things prevailed in Servia and the adjoining districts as described by Sir Henry Maine.* This was true where a village belonged to an undivided Brahmin or Kshatriya

* Punjab Customs, 105, 161. Maine's Ancient Law, 267. Evan's Bosnia, 44.

family. But ordinarily as described in the Smritis, lands were held and cultivated in severalty in villages by Sudras as a rule.

It is tolerably clear from the above that ordinarily a village consisted of many families of different castes who held separately and not jointly with each other for a Brahmana and a Chandala could not and would not hold land in coparceners. There were then more lands than men and a family could get as much land as it pleased. No doubt the system of communal zemindary, the *bhaichari* and the *pattidari* now found in the Punjab, prevailed where the villages belonged to one family, whether of Brahmins, Kshatriyas or other superior castes. . The gradual development of the system of the Communal Zemindary to the Bhaichari and the Pattidari systems, shows how originally land which was impartible and inalienable, became partible and alienable.

We have seen before that the custom of the eldest son taking the entire inheritance fell into disuse, leaving a remnant in the rule that he was entitled to a twentieth part more than his brothers. We have also seen how the rule of impartibility was got rid of. Every property under Hindu Law would thus be partible. But principalities could not be partible and the partition of military or service tenure would not be recognized by the State. Again lands dedicated

for pious purposes, though declared by Vrihaspati to be liable to partition, were considered impartible by all the other law-givers and they are also impartible and inalienable by the common law of the land, as has been rightly held by the Bombay High Court and the Privy Council.

As for the religious institutions, they are of more recent growth. Property belonging to these institution is considered as Debutter and impartible and inalienable. The head of the establishment is merely a manager for the congregation of Sanyasis. Blackstone speaking of the old rectors of churches says: "The rector (or governor) of a Church is also properly called a 'parson,' persona ecclesiæ, that is, one that hath full possession of a parochial Church is called *parson* because by his person, the Church which is an invisible body is represented." The position of the Mohunt was very similar to that of the old rector. But in India, every thing tends to despotism, and in course of time, the Mohunt assumed to himself greater temporal powers than was intended by the founder of the system. The origin of these institutions is a fascinating chapter of ancient history little studied and little known. It will be fully described in its proper place in the chapter on Endowments.

The Smritis are silent about the incidents of the above estates. Their rules no doubt apply to them so far as they are compatible with

impartibility. For the rule of principalities, we must look to the Puranas and other historical records. There is a great similarity in the rules governing all impartible estate. India is however, so vast a country that it will be foolish to look for one uniform rule governing all such estates. Different customs have originated from different conditions. We should therefore look more to custom than to the rules of the Smritis for guidance in these matters. In the case also of lands attached to offices, there is a great similarity in the customs governing them, as in Rajes, but in respect to them, there is a greater divergence on account of more varied local and racial conditions. In regard to Muths, the rules of monasteries laid down by Buddha were the basis of the rules laid down by Sankara. We should try to ascertain the rules laid down by Sankara as far as possible. But the Sanyasis are very often a rule unto themselves and though owing allegiance to Sankara, know but little about him and his rules. The customs of their own establishments govern them. And rightly have the Privy Council held that the custom of an establishment must be proved in every case concerning it. Nevertheless, the orthodox and ancient rules of monasteries should be ascertained. No attempt has yet been made to do so. It will be my endeavour to ascertain them from old Buddhistic records, the records of

Sankara Muths and the books about Sanyasis which are extant.

As to endowments they were originally all religious. In the Vedas, we find in the description of the Yagas, how in early times things were dedicated to the gods. A Yaga consists in parting with a thing that it may belong to a deity whom it is intended to propitiate, says the Mimansa.* The offerings became the property of the Gods. They were placed in the fire, (*Hutavaha*) the conveyer of offerings. Fire therefore, was the original trustee of all Debutter. That was the original law of the Aryan races. But when fire lost its preeminence, and images of Gods came into vogue, the permanence of daily worship of the idols became an object to be secured by those who set them up. It was necessary to preserve the property dedicated and not to throw it in the fire. Endowments thus came into existence. But there were no trusts or trust deeds. Peculiar ceremonies which will be discussed later on, were invented by which the donor was made to relinquish his right and the image was supposed to take physical possession of it.

Under the Roman law in pre-Christian ages, dedications were allowed to specified national deities by placing the gift on the altar of the God without the intervention of a trust and it

* Mimansa, 4-4-12.

became *extra commercium.* In early Christian times, a gift placed as it was expressed "on the altar of Gods" sufficed to convey to the Church the lands thus dedicated. After Christianity had become the religion of the empire, dedications for particular Churches or for the foundations of Churches and religious and charitable institutions were much encouraged. The officials of the Church were empowered specially to watch over the administration of the funds and estates thus dedicated to pious uses, but the immediate beneficiary was conceived as a personified realization of the Church, hospital or fund for ransoming prisoners from captivity. "Such a practical realism is not confined to the sphere of law; it is made use of even by merchants in their accounts and by furnishing an ideal centre for an institution to which necessary human attributes are ascribed—(Dhadphati *v.* Guroo, 6 Bom. 122)—it makes the application of the rules of law easy as in the case of an infant or a lunatic."† Property dedicated to a pious purpose is by the Hindu as by the Roman Law, placed *extra commercium* with similar practical savings as to sales of superfluous articles for the payment of debts and plainly necessary purposes." The Emperor of Rome forbade the alienation of

* W. and B. Hindu Law, p. 185. Ulpian Fr. XXII S. 6. Sav Syst Sec. 88.

† Sav. Syst. Sec. 90, Kinloch *v.* Secretary of State, 15 Ch. Div., p.8.

dedicated lands under any circumstance and the law was the same in India. *

The above observations apply in their entirety to religious institutions as well as to charitable endowments in this country.† In these cases it may be said that "there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation," and that "this artificial subject of rights is as capable of taking offerings of cash and jewels as of land" and that "those who take physical possession of such property" incur thereby a responsibility for its due application to the purposes of the foundation"‡ Hindu Law it has been held, like the Roman Law recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members but also the juridical persons called foundations.

But property dedicated to a god is like but not quite property dedicated to a religious institution like a church. A Hindu god is supposed to be a living entity who is neither an infant nor a lunatic. The gods are persons who are indifferent to the property which is supposed to belong to them. The profits of Debuttar should belong to Brahmans according to a text of Matsya

* Nov. 120, Cap. 10. See Vyahar Mayukha, Ch. IV. Sec. 7, p. 23.

† Manohar Gonesh Tambekar, *v.* Lakshmanram Gobindram, 12 Bom. 247. Rupa Jagset *v.* Krishnaji, 9 Bom. 169. W. & B. H L. 208, 185, 559, 555.

‡ Aberdeen Town Council *v.* Aberdeen University, L. R. 2 App. Cas. 544

Sukta.* That is a rule made by Brahmans for the benefit of Brahmans. But the true doctrine is contained in the following little known passage of the Chandogya Upanishada. "He who presents an oblation, has made an offering in all worlds, in all beings, in all souls * * * "As in the world hungry infants press round their mother, so do all beings await the holy oblations. They await the holy oblations."† Setting up a place of worship is the main benefit conferred. In that sense it is like a church. But the God is there apart from the image who is the holder of the property and is not a creature of law according to Hindu ideas. For practical purposes however, it would perhaps be safer to consider temples in the light of churches for the worship of Hindu gods and to apply the law applicable to the latter to them.

The scope of the present investigation is great. The enquiry is supremely interesting. As the field is all but unexplored, the labour required is great. We have to deal with Princes, Sanyasis and the gods. Our theme is a high

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* दैवे दत्त्वा तु दानानि दैवे दद्याच्च दक्षिणां ।
ततसर्व्वं ब्राह्मणे दद्यादन्यथा निष्फलं भवेत् ॥
Text of Matsya Sukta, cited by Raghu Nandan.

† अथ य एतदेवं विद्वानग्निहोत्रं जुहोति तस्य सर्व्वेषु लोकेषु भूतेषु सर्व्वेषु चात्मसु हुतंभवति ।
'यथेह क्षुधितावाला मातरं पर्युपासत एवं सर्वाणि भूतान्यग्निहोत्रमुपासत, इत्यग्निहोत्रमुपासत इति ॥
Chandogya Upanishada, 5th Prap. 24 Khand 2 5.

one, though difficult and laborious, and we should not flinch from the necessary trouble and labour. We shall travel back with the great modern scholars to the time when the Aryan nations lived together, and from the comparison of legal ideas and the wonderful evidence given by common words find out the conditions of society and land tenures when the races parted company with each other. We shall accompany the Aryan invaders to India and ascertain their relations with the aboriginal tribes and how the land was held by them. We shall see whether feudal tenures in India were introduced by the original Aryans, or by subsequent invaders who are supposed to be the ancestors of the modern Rajputs. We shall trace the history of modern Rajes and see how from very inglorious beginnings most of the great houses have risen to eminence in rather recent times. Then again, we shall go to humbler paths and walk with the lords of villages of Manu, in their journey through the centuries and ascertain the conditions of their tenures in Hindu provinces. We shall converse with the ascetics of Manu and be amused by the fantastic types of Sanyasis of pre-Buddha times. We shall sit at the feet of the great Teacher and learn from him the rules of his famous Sangha and then go to Sankara and find out why and how he formed the great orders we now see. We shall also go and ask Ramanuja and Ballabhacharya

why and how they formed their establishments and get an explanation from the latter of the abuses of his system. We shall go to Kabir and Nanaka and the warrior Guru and find out the rules of their establishments. We shall find out the origin of image worship in India and ascertain the history of the Gods. Beginning from the Yagas of the Vedas and the Yogakshema of the Smritis, we shall trace the history of Debutter to modern times. Last of all, we shall enjoy the pleasure of seeing how the old endowments were transmuted into finer shapes by coming into contact with the reason and the larger charity of Europeans and how the method and legal acumen of European lawyers have placed the law of the land on a basis certainly more methodical, legal, just and certain than what it was before their advent.

LECTURE II.

Impartible Zemindaries and Tenures.

THEIR HISTORY AND DESCRIPTION.

We have already seen from the evidence furnished by the customs of European Aryans in comparatively modern times of the old Roman and Greek historians, that among the ancient Aryans there were no Kings in the modern sense. But when the Aryan tribes migrated to the south and the west, the leader in war, the *Satpati*, began to be possessed of more power by the exigencies of circumstances than the ordinary King. The conquering general when the tribes settled in a country, became the king and a large district was allotted to him. To the followers also were allotted lands the extent of which was determined by their rank. The conquered people were as a rule reduced to the condition of serfs. The king having the largest quantity of land had the largest number of serfs. The nobles had number of serfs according to the extent of the land held by them. The despotic power of the king was the consequence of the overwhelming power which the possession

of the largest number of serfs gave him. Even so late as the close of the eighteenth century, we find that almost all the soldiers who fought in the armies of Maria Theresa, empress of Austria, and of Frederick II. were in reality serfs*.

The power given by the possession of serfs was the cause of the feudal system which sprang up wherever the conquering Aryans went. By feudalism should be understood the system under which the land was possessed by great lords under the king, who had to obey the laws established by him and to render military service to him. The peculiarities of the European system were the result of Roman legal ideas being engrafted upon pure feudalism. The gross oppressions and immoralities, sometimes found with European feudalism, were unknown in India. In India and ancient Persia, we find a state of things which again is not found elsewhere. It is now established by modern scholarship that the Indian and Persian Aryans lived together for sometime before they parted company with each other. The system of caste distinguishes the southern Aryans from the Europeans. How and when it was evolved is one of the secrets which antiquity has not yet divulged. In ancient Persia we find society divided into Athravans or priests, Kshatras or the warrior caste and the Vaisus or

* M. De Tocquville's France before the Revolution of 1789, p. 309.

the servile caste. In India we find the priestly caste of Brahmins, some of whom were called Atharvan Angiras, the Kshatryas or the warrior caste, the Vaisyas or the trading and agricultural class and lastly the Sudras. It thus appears that originally there were the priests and the fighting nobles and the common people who were called *Vic*. In Persia, the *Vic* or the Vaisus became the serfs of the Kshatras, as in Europe. In Europe, we find the nobles and *Vic* or the serfs. But what we miss are the Brahmins. The priests were there but in Europe, in ancient times,* learning did not flourish as early as in ancient Persia and India and the result was that the priesthood had not that preeminence among the population as in India and as they were not very much better than the rest, they disappeared when they came in contact with more civilized races.

On India, in the early morning of this world's civilization, the goddess of learning first set her feet. But she came with many fanciful gods, the chief of whom was the god of fire. The hymns for the worship of fire were among the earliest hymns of the Aryan races. Long before the Rig Veda was composed, a complicated ritual for the worship of the fire and through him, of the other gods had been developed. There was

* The civilization and learning of the Greeks owed its origin to the Phœnecians, Persians and Egyptians.

no writing and a class of men were necessary who would be versed in the ritual and the mantras. These became the Brahmanas. But it appears that in India at least the Brahmanas did not at first despise meaner worldly occupations.

The earliest Riks speak of great conquering kings like Sudash and their more famous priests like Vasista. The genius of Sudash is of little count when compared with the power of the Atharvan Vasista, who by means of sacrifices and charms made the gods help the great king in his battles. We find the Aryan settlers living like great lords surrounded by many slaves and many cattle. We find a priesthood well versed in the complicated ritual of the Vedic ceremonies, the greatest of whom were still composing new hymns, who were paid for their services with many cattle and sometimes with the daughters of kings bedecked with golden ornaments.

The only occupation of Kings was war and the performance of sacrifices. When wars ceased with the establishment of great empires, some of the emperors, *Samrats*, *Ekrats*, and the like are said to have "performed so many sacrifices that the earth was filled with sacrificial posts." The great ambition of Kings was to be like the performer of a hundred sacrifices, *Shatakratu*. The occupation of priests thus became very lucrative and they soon made themselves into an exclusive caste superior to the rest. Learning

was essential to their profession and great schools were soon formed. An amount of intellectual activity was developed which seems wonderful in these days. But that activity was confined to grammar, prosody and the like, necessary for the proper recitation of mantras. Astronomy, astrology and mathematics necessary for Yajnas and the measurement of places of sacrifice, were also largely cultivated. Other sciences also were cultivated which were of use to kings, namely, law, medicine, polity, the art of war, the art of training horses and elephants and the like. But the sacrificial lore overshadowed all the rest. The pre-eminence of Brahmans being thus established, they codified the law of the ancient Aryans which the conquerors had brought with them and modified them according to circumtances. In order to secure their own position, they made the law superior to Kings. They ordained rules for the conduct of Kings. Their philosophy corresponded with their self-interest. We thus find that in early times in India, there were great Kings and a class of nobles or petty chiefs called Kshatras or Rajanyas. There were a numerous class of Brahmins. Then again, there were the common free Aryan cultivators and artisans the Vic or the Vaisyas. And lastly there were the conquered population who were all serfs and called Daṣyus or Dases, and Sudras. The Mahabharata tells us that the Brahmans and Kshatriyas were

originally one tribe (1). The Kshatriyas were Rajanyas or descendants of kings and chiefs. The Brahmans were quite as much a fighting people as the Kshatriyas. Bhrigu the Brahmin married the daughter of Gadhi the Kshatriya king. His son Parusuram exterminated the Kshatriyas. The causes of the struggle were the oppressions of the Kshatriyas. The immediate cause was the spoliation of the cattle of Bhrigu. Some say, it was his murder by the Haihaya King Arjuna the son of Kritavirya. The Rajanyas or nobles were exterminated. At what remote period this event, which the tradition of antiquity tells us was an undoubted historical fact, happened, it is impossible to say. It was before the time of Viswamitra and at the time of Kasyapa the Rishi to whom Parsuram made over the conquered empire, himself retiring to the Deccan. It was about the time when the Vedas were composed and it might have happened outside India but the Zendavesta contains no mention of it. Again the struggle was with the Haihaya King Arjuna and it is probable that it happened in India. However that might be, as in the French revolution, the oppressions of the Kshatriyas or nobles led

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(1) ब्रह्म चवमिह सृष्टमेकयोनि स्वयम्भुवा।
शान्तिपर्व्व ॥ ७४ अः १३।

चत्वा वै ब्रह्मणो योनिर्योनि चवस्य वै द्विजा।
शान्तिपर्व्व ॥ ७३ अः ११।

to their extermination by an enraged population led by Parsuram. But republics were not the result of this revolution as they were in Rome and Greece, though republics were not quite unknown in India, for in later times about the fifth century B. C., we find Buddhistic books mentioning the existence of a republic of the tribe of Mallas in north Behar. Having regard to the large slave population, kings and fighting chiefs were necessary, and kings and nobles probably of Brahmin origin soon sprung up, the first of whom was Kasyapa. This explains the fact that modern Kshatriyas bear the Gotra-names of Brahmans. The Rajanyas however, were as popular as ever and the division of priests and nobles was as necessary as before. The new kings and nobles became Kshatriyas or Rajanyas. But the Brahmans had established that law was divine and binding on the kings and the Brahman had rights not possessed by others, one of them being that the property of a Brahman could never be taken by the king—a rule which reminds one of those dreadful times in remote antiquity when kings like Arjuna and Viswamitra took away by force the cattle of Brahmans. It became also incumbent on the King to be guided by a council consisting of Brahmans, Kshatriyas and other races led by Brahmans. Say what Manu may, the Brahmans had never ceased to hold lands and cattle as appear from the ancient marriage mantras which

enjoin a Brahman to give to the bridegroom land and cows and slaves, at the time of marriage.

When the Aryans first came to India Brahmins and Kshatriyas were one tribe of fighting men and we find Brahmans engaged in mechanical arts. But in India the conquerors became all landholders and petty chiefs. The Vaisyas or the white serfs became the pastoral classes, artisans and agriculturists, and the Sudras were the serf or slaves. The aboriginal tribes who had not been reduced to slavery were called Dasyus or Dases. A rule of primogeniture seems to have prevailed among Brahmans as well as among Kshatriyas. If tradition speaks true, the Nambudri Brahmans were settled in the Malabar country by Parasuram and they claim to have preserved the original Brahmin customs of which primogeniture was one. The more considerable chiefs were called Samanta Rajas. These Samanta Rajas were the originals of all impartible Rajes, Polliams and other impartible tenures. Then again the officers of the king and the lords of villages, lords of ten or hundred villages, as well as the governors of towns and provinces, had all lands attached to, or the revenues of lands appropriated for, their office. The office usually went to the eldest son and these tenures became hereditary and impartible. These are the originals of Deshmukhs, Deshpandes and such other holders of office.

These were either Kshatriyas or a certain Aryan caste of doubtful origin named Kayasthas who were writers of deeds, accountants and court officers. Every village had its accountant and lands were assigned to him in lieu of service. The Muzumdars, Pareks and Mehtas of Bombay, are the descendants of the old Hindu accountants. All offices were hereditary in India. The younger sons of Brahmans became landless priests and pundits, the more learned or the more fortunate among them receiving grants of villages as recognition of their merit. It is to these landless poor Brahmans, we owe the learning of ancient India, and it is these who re-established the rule of the equal partition of paternal property among sons. As the lands possessed by Brahmins were very often not attached to an office, the establishment of the rule of partition was easy in their case. In the case of Kshatriyas however, it was different.

From the time of the Upanishads, we find the Kshatriyas denominated as Kurus, Panchalas, Videhas, Raghus, Yadhavas, Yadus, Haihayas and the like. The chief was called the king of Raghus, Kurus, Yadus or the Haihayas, like the chiefs of Scottish clans. From this it appears that the younger sons and their dependants were the soldiers round the chief of the clan. Even when the Aryans came here, it was, as in Germany, that the Propinquæ fought

round their chief and when they settled they settled together with their chief as king or prince or Samanta Raja under a king. Originally it does appear that even in case of kingdoms, impartibility was not the universal rule, for we find many kings in the Puranas dividing their kingdoms among their sons. Even during the time of the Ramayana, we find Rama partitioning his empire among his sons and nephews. But the rule of impartibility of kingdoms is insisted upon in various places in the Ramayana, and we find Janaka mentioning that his father conquered a new kingdom that of Sankasya and made his younger brother Kushadhwaja king there, as the kingdom of the Videhas could not be partitioned. Again wherever there is mention of the eldest son succeeding to the kingdom of Ayodhya, it is added that it is the family custom of the Raghus.

Now whatever might have been the institutions of the original Aryan settlers, they were greatly modified by the customs of succeeding waves of immigrations into India from Central Asia. The Yadavas were new comers. The Haihayas who are mentioned in the Puranas as a subdivision of the Yadavas were no better But they came in the Vedic times for the Rig-Veda speaks of this discomfiture of Turbasu the Yadava. We find Haihayas, Vahlikas, Daradas Pahlavas, Gandharas, Shakas, Chinese, Tusharas

and Yavanas coming to India and settling here before the time of the Mahabharata and described by it as non-Aryans. Some of them were of Aryan origin but the great majority of them were of non-Aryan origin. It is surprising to find that all these races and even the Bactrian Greeks soon assimilated the customs of the ancient Aryans and got themselves recognized as Kshatriyas, though the Mahabharata allowed them only the status of Sudras. Things went on in this state till we come to the king Mahapadmananda, the son of the Sudrà wife of a Kshatriya king of Maghada. He, it is said, attained to the rank of Chakravarti of all India and exterminated all the Kshatriyas like a second Parasurama.

The line of the nine Nandas was put an end to by Chandragupta the Maurya. The grandson of Chandragupta was the great emperor Asoka, who made all India Buddhist. The Kshatriyas as a class thus disappeared, the emperors being Sudras, though the Brahmins did not quite disappear. The old order of things was however quite changed. The Vishnu Purana describes the kaleidoscopic change of dyansties who ruled in Maghada. Nandas were succeeded by Mauryas, Mauryas by Sungas, Sungas by Kanyas, Andhras and Abhirs, they by Sakas or Scythians, Sakas by the Yavanas kings and they by Tukhars and so on. We also find the great Scythian

king Kaniksha ruling over a great part of India a little before the Christian era. It is really a marvel to find Brahmanism regaining its hold on the Indian people, after a thousand years of Buddhistic rule and its admixture with the barbarians from the West and the North. During the time of Fa Hien, India was half Buddhist and half Hindu. But Kings like Vikramaditya I. and Vikramaditya VI. and Yashovardan managed to re-establish Hinduism for a time in India. But with Kashyapa the Agnihotra who threw away the materials of his Agnihotra into the Niranjana at the bidding of Buddha, the daily worship of the fire disappeared and never regained its supremacy. The sacrifices of cows and horses prohibited by Buddha never reappeared. With the disappearance of the Agnihotra and the other Yajnas, the old mode of life of the Aryan, divided as it was, into four periods, beginning with the Brahmacharya, disappeared. Brahmans and Kshatriyas began to work like Sudras. The old constitution was attempted by the Hindu Kings to be re-established but only with partial success. The old order of things had completely disappeared, and with it, the old Kshatriyas. Now the kings were mostly of other castes and nationalities who called themselves Kshatriyas because they were kings. Scythians and Paundras, Andhras and Madras, Dases and Kaibartas, all became

Kshatriyas. In this confusion however the village communities remained unchanged.

The great changes of dynasties and religions affected the towns and the superior classes. The agriculturists and pastoral classes, the Vaisyas, and Sudras in the villages pursued the even tenor of their ways, little affected by these changes. They worshipped the demons and village gods and married according to their own customs without Brahmins and Sanskrit Mantras and settled all their affairs by their caste Punchayets. The village headman and the accountant retained their offices. The lords of ten or hundred villages became very often petty Rajas. But only a few of them could survive the waves of foreign invasion.

When the Muhammadans came, the most important kings of India were Rajpoots, Chohans and Rahtores, Shisodeas and Bhattis and others who claimed to be of the solar or the lunar or of the fire race but many whom as Colonel Tod surmises were of Scythian origin. They were Hindus and they still remain so. It is in the States of Udaypore and Jodhpore, Jaypore and Jassalmere that we find remnants of pre-Muhammadan institutions. There we find a complete feudal system. Udaypore or Chitor belonged originally to the descendants of the great Bappa Roal. The land was partitioned among the sons of a king, the eldest becoming

king and the rest his feudal lords. The fiefs were held on condition of military service and governed like the parent state by the law of primogeniture, the bulk of the lands of the fief going to the eldest son, the younger sons getting portions of the land as subordinate fiefs. Yodhpore was founded by Yodha. In the course of three or four centuries, the chief of Yodhpore could count upon a "lac of swordsmen all children of Yodha." There was also a sprinking of nobles of other families who by the favour of the reigning king got fiefs from him. But the great majority of the chiefs were "sons of one father." It is the repetition of the ancient story of the Kasis, the Raghus, the Videhas, the Kurus and the Panchalas. This system is the origin of all impartible estates in India as elsewhere. The admixture of a large foreign element has, to a great extent, made men forget the original system.

The impartibility of lands attached to offices has got a different history. The ancient system of Manu with certain alterations continued to obtain in India before and after the Muhammadan invasion. It prevailed in Rajputana as described by Col. Tod and also in the Southern Mahratta country. It is in the Mahratta country where Muhammadan rule was least felt and lasted for the shortest period, that we find the old Hindu system existing in its purity. Elphinstone writing in 1812 says

"A turruf is composed of an indefinite number of villages, it is under a particular officer (a Naik), several turrufs, make a pergunna which is under a Deshmook who performs the same functions towards the pergunna as the *Patil* towards the village. He is assisted by a Des Pandra who answers to the *kulkarny* or village registrar. It is universally believed in the Mahratta country that the Desmooks, Des Pandras &c., were all officers appointed by some former government, and it seems probable that they were revenue officers of the Hindu Government. These officers still hold the land and fees that were originally assigned to them as wages, and are considered as servants of the Government; but the only duty they perform is to produce their old records when required to settle disputes about land by a reference to those records, and to keep a register of all new grants and transfers of property either by Government or by individuals."

The state of things in the Deccan is thus described by Colonel W. H. Sykes in his book on the Land Tenures of the Deccan (Dec. 1830). "All lands were classed within some village boundary or other. Villages had a constitution their internal government, consisting of the for Patel, or chief, assisted by a Changala, the Kulkarin, or village accountant, and the well-known village officers, the baraballo; the numbers

of the latter were complete or not, according to the population of the village, and the consequent means of supporting them. A few villages constituted a Naikwari, over which was an officer with the designation of Naik. Eighty-four villages constituted a Desmukh, equivalent to a pergunna or country. Over this number was placed a Desmukh, as governor, assisted by a Deschangla; and for the branch of accounts there was a Despande, or district accountant and registrar. The links connecting the Desmukhs with the prince were the Sar Desmukhs or heads of the Desmukhs, they were few in number. It is said there were also Sar Despands. The Sar Desmukhs, Desmukhs, Naiks, Patels, and Changalas, in short all persons in authority, were Marhattas; the writers and accountants were mostly Brahmins.

(1) Desmukhs, of such and such districts. Their rights were hereditary and saleable, wholly or in part. The concurring testimony of the people proves the hereditary right; and the proof of the power to sell is found in Brahmins and other castes, and some few Mussulmans, being now sharers in the dignities, rights, and emolumets of Desmukh. * * * The Desmukhs were no doubt originally appointed by Government, and they possessed all the above advantages, on the tenure of collecting and being responsible for the revenue, for superintending the cultivation and

police of the districts, and carrying into effect all orders of Government. They were, in fact, to a district what a Patel is to a village; in short, were charged with its whole government.

(2) Despandahs are contemporary in their institution with the Desmukhs; they are the writers and accountants of the latter, and are always Brahmins; they are to Districts what Kulkarnis are to villages. Like the Desmukhs they have a percentage on the revenue, but in a diminished ratio of from 25 to 50 per cent. below that of the Desmukhs. Their duties are to keep detailed accounts of the revenue of their districts, and to furnish Government with copies; they were also writers, accountants, and registrars within their own limits.

(3) Patels, usually called Potails, or head-men of towns and villages. This office, together with the village accountant, is no doubt coeval with those of the Desmukh and Despandah. The Sanskrit term Gramadikari, I am told by Brahmins, would be descriptive of the lord or master of the village, and equivalent to the present term Sawa Inamdar, rather than that of Patel; gram, in Sanskrit, meaning village; adikar, the bearing of the royal insignia, being pre-eniment. Originally the Patels were Marhattas only; but sale, gift, or other causes have extended the right to many other castes. A very great majority of Patels, however, are still Marhattas; their offices were

hereditary and saleable, and many documentary proofs are extant of such sales. I made a translation of one of these documents, dated 104 years ago; it was executed in the face of the country, and with the knowledge of the Government. This paper fully illustrates all the rights, dignities, and emoluments of the office of Patel. He was personally resposible for the Government revenue, he superintended the police of the village, regulated its internal economy, and presided in all village councils.

(4) Kulkarni.—The next village tenure is that of Kulkarni; the office is of very great importance, for the Kulkrani is not only the accountant of the Government revenue, but he keeps the private accounts of each individual in the village, and is the general amanuensis; few of the cultivators, the Patels frequently included, being able to write or cypher for themselves. In no instance have I found this office held by any other caste than the Brahminical.

(5) Mokuddum.—The term is applied to the Patel's office. It is an Arabic term, and meaning "chief," "head," "leader," and is properly applicable to an individual only. The equal right of inheritance in Hindu children to the emoluments and advantages of hereditary offices, the functions of which could be exercised only by the senior of the family, rendered a distinctive appellation necessary for this person, and he was called

Mokuddum. The sale of parts of the office of Patel, however, to other families, the heads of which would also be "Mokuddum," rendered the qualifying adjective necessary in all writings of half Mokuddum, quarter Mokuddum and according to the share each family held in the office. Thus His Highness Seendeh (Scindiah) is six-sevenths-Mokuddum at Jamgaon, the other Marhatta sharer one-seventh, and the like in other instances.

In the case of Beema Shunker *v.* Jamas Jee (2 Moore 23, 1837) the Privy Council, in a case in which a grantee in Enam from the Government in 1803 sought to recover land enjoyed by the village officers, thus described their position: "There were certain hereditary revenue officers forming together an establishment denominated the establishment of Mehta Parek (consisting of Mujmoodars or general supervisors of accounts, of a Parek or receiver and of a Mehta or registered clerk) were attached to the Pergunna who by the virtue of their respective offices were entitled to receive certain fees amounting to the sum of Rs. 56 annually collected from the revenues of the village." These offices were held to be ancient and hereditary and their rights established by immemorial usage.

When the Muhammadans came to India, the state of things is well described by Mirza Mohsen, a learned authority quoted by Sir B. Rouse in his

Dissertation concerning landed property in Bengal (1791). He says: "In times prior to the irruptions of the Mahomedans, the Rajas who held their residence at Delhi and possessed the sovereignty of Hindustan deputed officers to collect their revenues (kheraji) who were called in the Indian language Choudheries. The word Zemindar is Persian. On the Muhammadan conquest, the lands in Hindustan were allotted to Omra Jaghirdars for the maintenance of the troops distributed throughout the country. Several of these Omras having rebelled the emperors thought it would be more politic to commit the management of the country to native Hindus who had most distinguished themselves by the readiness and constancy of their obedience to the sovereign power. In pursuance of this plan, districts were allotted to members of them under a reasonable revenue (Jummah Monasib) which they were required to pay in money to the governors of the provinces deputed from the emperor."

In Bengal, we find that during the Pathan period, the Muhammadan Jagirdars who at one time held most of the land, rebelled and after a sanguinary war were wiped off and succeeded by Hindu collectors of revenue called Zemindars, Chowdhuries and Crories. Throughout India, except in the case of a few Rajas, whose Rajes had been recognized by the Emperor, all the old principal collecting officers and landholders of

the Hindu times were superseded by the Omras and after them by the new Crories. But the Omras did not wholly cease to exist. Many of them still held large territorial possessions called Jagirs and were great feudal chiefs wielding large powers like Mahabat Khan, Mir Jumla, and the great Syyads. But during the bloody times which saw the decline and fall of the house of the great Moghul, most of the prominent Omras disappeared with the emperor. The fate of the Hindu Zemindars was not very much better.

"Originally there is no doubt, the Zemindar was an officer of the crown. The famous Fifth Report rightly describes his position in the following words "The office itself was to be traced as far back as the time of the Hindu Rajas. It originally went by the name of Chowdree, which was changed by the Mahomedans for that of Crorie, in consequence of an arrangement by which the land was so divided among the collectors, that each had the charge of a portion of country yielding about a crore of *dams*, or two and a half lakhs of rupees. It was not until a late period of the Mahomedan Government that the term *crorie* was superseded by that of Zemindar, which literally signifying a possessor of land, gave color to that misconstruction of their tenure which assigned to them an hereditary right to the soil."

The power exercised by these Zemindars

was so great that Alauddin the Khilji Emperor, who died in 1316 A. D. thought it right to curb their power by requiring the Superintendents of the revenue department "to take care that the Zemindars demand no more from the cultivators than the estimates the Zemindars themselves had made."* But as Mr. Phillips in his Tagore lectures, remarks, in spite of this check, the power of the Zemindars was not crushed but they regained their position and became almost independent.† In Bengal, during the time of Akbar, the Aini Akbari tells us, the entire country was under Zemindars who were mostly Kayesthas, who had to furnish 23,330 cavalry, 801,158 infantry, 170 elephants, 4,260 cannon and 4,400 boats.‡ About the end of the reign of Akbar, twelve of these Zemindars who were probably Crories, taking advantage of the great power which their position gave them brought all the minor Zemindars under them and Bengal began to be called for a time the land of twelve Bhuyans. Two of them, Pratapaditya of Jessore, and Sitaram of Bhushna, became so powerful as to defy the power of the Great Moghul, though they were crushed after a short but sharp struggle. The greatest of them all was a Muhammadan chief named Isa Khan whose great power the armies of Akbar could only curb and failed to

* Palton's Asiatic Monarchies, 88, 89.
† Tagore Law Lecture 1875, p 66. ‡ Ayeen Akberi, p. 310.

destroy altogether. The power of the Zemindar was in the course of a few years broken by the Moghuls and the authority of the central government firmly established, by Shayesta Khan, Murshid Kuli Khan and Jaffer Khan. Jaffer Khan, the Subadar during the reign of Aurungzebe, is said to have removed the entire body of the Zemindars of Bengal (Patton's Asiatic Monarchies, p. 167,54) and appointed new ones, a few only retaining their old position with great difficulty.

'The old Hindu Chowdhurees became the Muhammadan Crorees *i.e.* a revenue collectors of a *Chukla* yielding a revenue of a crore of dams or 2½ lacs of rupees. "In the time of Akbar and his successors, the crories, in obedience to the orders of the emperor went to Court. Such among the Zemindar's relations as possessed abilities, the emperor after satisfying himself on that point, nominated to the management of particular districts; and by conducting the business to his satisfaction, they obtained an allowance of *Nankar* and received the appellation of Chowdhury. The principal Zemindars it appears, over and above the Nankar received title and Jagirs according to their rank."*

Many cases happened in which on the death of a Zemindar, a servant or a relation got himself

* Harington's Analysis, p. 113, opinion of Gholam Hossein Khan, son of Fukhun-ool Dowlat, formerly Nazim of Behar, forming an appendix to the Minute of Sir John Shore, dated 2nd April, 1788.

fraudulently appointed to the exclusion of the real heir. But the rule was that the office and the Jagirs and Nankar were impartible and devolved on the eldest son. This was not agreeable to the Government in 1792. In the Revenue letter from Bengal, 6th March 1793 (para. 8 of the Select Committee's report of 1810, Appendix No. 9, p. 100) we find the following: "The same principles which induced us to resolve upon the separation of the talooks, prompted us to recommend to you, on the 30th March 1793, the abolition of a custom introduced under the native governments, by which most of the principal Zemindaris in the country are made to descend entire to the eldest son, or next heir of the last incumbent, in opposition both to the Hindu and Mohamedan laws which admit of no exclusive right of inheritance in favour of primogeniture, but require that the property of a deceased person shall be divided amongst his sons or heirs in certain specified proportions. Finding, however, upon a reference to your former orders, that you had frequently expressed a wish that the large Zemindaris should be dismembered if it could be effected consistently with the principles of justice, we did not hesitate to adopt the measure without waiting for your sanction." (See also Francis's Revenues of Bengal, p. 59). This was done by Reg. of 1793 the history of which I shall describe later on. On 2nd April, 1788 Sir J. Shore

(Harington, Analysis, pp. 23, 24) wrote with truth that "most of the considerable Zemindars in Bengal may be traced to an origin within the last century and a half. The extent of their jurisdiction has been considerably augmented during the time of Jafur Khan and since (1) by purchase from the original proprietors, (2) by acquisition in default of legal heirs, or (3) in consequence of the confiscation of the lands of other Zemindars, (4) Instances are even related in which Zemindaris have been forced upon the incumbents." It then mentions that "the Zamindary of Dinajpore was confirmed by a firman of Shah Jehan about 1650. So the the origin of the Burdwan Zemindary may be traced to the year 1680, when a *very small portion of* it was given to a person named Aboo. Nuddea and Lushkurpore Zemindars are of later date 1719".* (See Shore's Minute).

In answer to the qustion put by the Parliamentary Committee: "Are there many districts in which the right of primogeniture is supposed to prevail?" Mr. Holt Mackenzie in 1832 (Session 1831, 32, Vol. XI., questions 2648, 2649), said: "I believe it prevailed in regard to some estates in all the provinces but is now confined to certain extensive zemindaries on the western frontier of Bengal and Behar, where the zemindars are the descendants of old Rajas who were never

* Law and Constitution of India, 1825.

wholly subdued by the governments that preceded us. In cases in which it had been adopted from considerations of financial convenience, the custom was abolished by the rules of 1793."

From the above, it would appear that the custom of impartibility of large Zemindaries was abolished by the rules of 1793. From this it must not be supposed that all Zemindaries were impartible before. Those that required Sunnuds from government only were impartible, the holders being considered officers of Government.

There was however, a difference between classes of Zemindaries. Certain Zemindaries were originally Rajes, called Zemindaries in the official records. In the Appendix to the minute of Sir John Shore dated 2nd April, 1788* we find the following answer by the Roy Royan: "The Zemindars of a middle and inferior rank, and Talookdars and Muzkoories at large hold their lands to this day solely by virtue of inheritance; whereas the superior Zemindars (Chowdries), such as those of Burdwan, Nuddea, Dinajpore etc. after succeeding to their Zemindaries on the ground of inheritance are accustomed to receive on the payment of a nuzeranna, paiskush etc., a dewanny sannud from Government. In former times the Zemindars of Bishenpore, Pachete, Beerbhoom and Roshmabad, used to succeed in the first instance by the right of inheritance and

* Harrington, Analysis, p. 113.

to solicit, afterwards as a matter of course, a confirmation from the ruling power."

It thus appears that there were three classes of land-holders. First the Zemindars whose ancestors were independant kings like that of Bishenpore, Pachete, Beerbhoom, etc., second, the large zemindars like Burdwan, Nuddea, etc. of recent origin and third, the smaller talookdars whose tenures had been carved out of the large zemindaries and who when in possession of entire villages, in many cases, succeeded in becoming independent of the superior Zemindars during the time of the Permanent Settlement.

There is no doubt that Zemindars under the Mohammadan government are described in the Dewani Sunnuds as mere holders of offices or Khedmuts, but it was not true of the descendants of the old Rajas like those of Bishenpore.

The Zemindars and Talookdars very often contrived to absorb the functions or at least the chief emoluments of the headman and to displace him to a great extent. The famous twelve Zemindars who held Bengal during the later part of the reign of Akbar, in some royal estate, were called Bhuyans or Prodhans. There were a class of people in Bengal and Behar, as in the rest of India, who were headmen of villages, called Pardhans in Chotanagpore, Munduls or Mucadims in Bengal, Bhuian, Gand or Ganda, Potail or

Patel in other parts of the country. The position of the headman is thus described by Sir John Shore (June, 1789). "He assists in fixing the rent, in directing the cultivation and in making collections. Their power and influence over the inferior ryots is great and extensive; they compromise with the farmers at their expense, and procure their own rents to be lowered. They make a traffic in pattahs, lowering the rates of them for private stipulations, and connive at the separation and secretion of lands." In Halhed's Memoir on the land tenure and principles of taxation in the Bengal Presidency, Purdhans are thus described: "The Mohamedans are, in some pergunnahs, considered as executing their office of Purdhan or Mokuddun under an original hereditary right, coequal with that which sanctions the succession to patrimonial property in the soil; in some instances, the purdhanee is included in the Zemindary claims advanced by individuals, and its existence is acknowledged by the other proprietors. Instances of the office being sold by the incumbent are on record; in general, however, the Purdhan's continuance in office depends upon the degree of consideration he enjoys in the eyes of those of his fellow-parishioners who are landowners, and who could, by direct or indirect means, secure his dismissal, if he neglets their interests. On the office falling vacant, the eldest son of the late incumbent, or a near relation generally succeeds.

The original office of a Purdhan or Mocudum appears to have been very similar to that of the Gramadhiput of the Hindu system ; he is a public officer ; arranges all the revenue details of his parish ; is the magistrate of the village, and with the assistance of the Chowkidars or night watchmen superintends the police of it." Many Zemindars and Rajas were evolved out of humble village headman. It is said that the Raja of Benares attained his position in this way.*

Under the Hindu system as described in the Manu Smriti and Kamandaki Nitisara and other Niti Sastras† there were Pradhans or Maulas and Samantas. The Samanta Rajas or dependent Rajas were to be twelve in number. This may have been the origin of the tradition that Bengal under the Pal Kings was under twelve Bhuyans or Bhuswamis and that there were twelve Bhuias in Assam, as well as in Arracan.

I have given you short history of the Zemindar, who was, except in the case of an ancient principality, originally an officer of State. I have also described how he came to be considered the owner of his estate. It was not however, without a challenge in the Courts of law that the position of Zemindars as owners of estates was established. An attempt was made about end the of the

* Tagore Law Lecture of 1875 of 64.

† The authors of books on polity are mentioned in the Mahabharata (Santi Parva 58 Ch. 1-3) to be Vrihaspati, Sukra, Indra, Pracheta, Manu, Bharadwaja and Goursira. We have now a book on polity by Sukra called Sukra Niti and Kamandaki's Nitisara. The other books seem to be lost.

eighteenth century to enforce bond debts against Muffussil Zemindars in the Supreme Court of Calcutta on the ground that they were officers of State. The then Advocate-General, Sir John Day, taking the Persian words in their literal sense declared the Zemindars to be landholders and therefore not amenable to the jurisdiction of the Supreme Court. On this the Government acted, as Mr. Halhed says. "The Governor-General and his Council were committed in their opinions to vindicate the plea set up against the jurisdiction of the Supreme Court by admitting that the Zemindars were land-holders and held their lands and right by inheritance". The Supreme Court upheld the Zemindars' contention.†

Indeed it is true as Mr. Holt Mackenzie stated in 1832 "that the Zemindars of Bengal though many of them held originally a mere office, must be considered as having been vested by our settlement with the property of everything within their Zemindaries which belonged to the Government and was not reserved by it." Indeed whatever might have been the position of the Zemindars in former times, since the Permanent Settlement, they must be considered as proprietors of estates.

With the exception of a few princely houses in Behar and Chotanagpore, all the Zemindar and

* Rouse's Dessertation concering landed properly in Bengal, p. 45.
† Halhed's, pp. V., VI.

Raj houses are of recent origin. It would serve no good purpose to relate their humble origin or the not very glorious deeds by which they acquired their Zemindaries. None of them acquired them by any great service to the people or the king. Many of them have distinguished themselves by acts of public beneficence and I believe in these enlightened times, they will all ennoble their houses by great and good actions and establish claims to nobility higher than the nobility of ancient origin.

'I shall now give you a short description of some of the more important impartible tenures.

The whole of Orissa was at a time under the Gajapati kings of Cuttack. The country had been parcelled out by them to certain military chiefs called the Garjat Rajas. When the Orissa king was deprived of his power, the Garjat chiefs did not disappear. They continued to hold their lands and dignities under the Muhammadans, the Mahrattas and also under the English. There customs were ascertained by what is called the Pachees Sawal.

In Orissa, we have the old Hindu system better preserved than in other parts of the country. I have told you of the military chiefs. There are also tenures attached to every possible office. We have the following tenures there Taluk Sadar Kanunog (accountant) Taluk Wilayite (assistant) Kanungo, Taluk Chowdhari or khandpati

or khandact Taluk Mukaddam or Pradhan (head of a village of Manu) Taluk Pursette or Pura Sresti (head of a town of Manu) Taluk Sarbarkari, Taluk Mahapatra or great minister, Taluk Rai Garu or royal preceptor, Taluk Pabraj or chief among Brahmans, Taluk Santra or border chief, Taluk Bhatta or bard, Taluk Bara Panda or great pundit, Taluk Malbahar or great athlete, Taluk Maratha or great warrior, Taluk Das or servitor, Taluk Mahanti or of great heart, Taluk Patnaek or chief lord, Taluk Utsal Ranajit or exalted conqueror, Taluk Bairi Ganjan or conqueror of enemies, Taluk Dandrai or club loving lord, Taluk Dakshin Rai or lord of the south, Taluk Srichandan or mild as white sandal wood, Taluk Harechandan or sweet as yellow sandal wood, Taluk Sudhakar or receptacle of nectar, Taluk Madanra or lovely as cupid, Taluk Nisankar or fearless lord, Taluk Bhumia or landed proprietor.* These tenures were created by the Gajapati kings. Many were originally impartible. Now most of these have become partible.

In Chotanagpore, it appears, there were at some ancient time three or four independent chiefs, who in their turn had created military tenures held by persons called Tekaits *i.e.* persons who had the royal mark on their foreheads which, it is said, was given by the right toe of the superior chiefs. These Tekaits have managed

* Hunter's Statistical Account of Bengal, Vol. 18, p. 129.

to survive the changes of dynasties. They are now quite independent of their superior chiefs.

Then again, under the chiefs of Chotanagpore, Pachete, Birbhoom, Kharagpore, Gidhour etc., there were guardians of passes called Ghatwals who had lands granted to them in lieu of service. Many of these Ghatwals became in recent years independent of their chiefs.

We next come to the Oude Talookdars. They were the great barons of the Province who existed before the conquest of it by the British. Many of these estates were confiscated after the Mutiny. Those that were maintained became the subject of Act III. of 1865. They were classified and their rights to some extent determined by that Act. Section 9 of the Act enacts that there should be :

"1. A list of all persons who are to be considered Taluqdars within the meaning of this act ;

2. A list of the Taluqdars whose estates according to the custom of the family on and before the thirteenth day of February 1856, ordinarily devolved upon a single heir ;

3. A list of the Talukdars, not included in the second of such lists, to whom sanads or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such sanads

or grants shall thereafter be regulated by the rule of primogeniture ;

4. A list of the Taluqdars to whom the provisions of Section twenty-three are applicable ;

5. A list of the Grantees to whom sanads or grants have been or may be given or made by the British Government, up to the date fixed for the closing of such list, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture ;

6. A list of the Grantees to whom the provisions of Section twenty-three are applicable." Section 23, runs as follows : Except in the cases provided for by Section twenty-two, the succession to all property left by Taluqdars and Grantees, and their heirs and legatees, dying intestate, shall be regulated by the ordinary law to which members of the intestate's tribe and religion are subject.

In Bombay and Madras, as we have seen before, the Hindu system was maintained till very recent times. The service tenures of Bombay have been described above. These were called Vatans. They were hereditary tenures granted by Hindu kings to village and district officers like Desmukhs, Despandes &c. The Bombay Act 3 of 1874 and Act 5 of 1886 were passed to declare their inalienable character and to regulate their incidents. In Madras also, these village

officers had lands attached to them, one instance of which is that of Karnum or accountant.

A Saranjan or grant in Jagir is a grant of the revenue not of the soil in consideration of services rendered. This was the usual mode of recognizing merit among Hindu and Mahammadan kings.

In Madras, where Hindu kingdoms maintained their maintenance longer than in other parts of India, we find a system of feudal tenure which is a counterpart of that of the Tekaits of Chotanagpore. These chiefs also, were never really subjugated by the Muhammadans. They were originally dependent Rajas who held on military tenure and owing allegiance to the great independent Kings of the South like those of Vijaynagar. They will be more fully described in the next Chapter.

The Dayadi Pattans of Madras are peculiar tenures like the Shashanas of Orissa. The Hindu kings granted villages to learned Brahmans under copper plate grants called Shasanas. These were partible, except in Madras, where among the Nambudri Brahmins, the custom of succession of the eldest son prevailed. But in these cases and in other cases, where without a grant, a village was held by a family, which was therefore called a Dayadi Pattan, *i.e.*, a settlement of a family, the custom of one member being the manager prevailed. This peculiar custom will be fully described in its proper place,

Akin to these are the Tarwads of the Nairs, where also the land is held by a family under a manager called Karnarvan, and also the estates of the Tiyars and the Illuvans of Palighat held by non-Brahmin castes where peculiar rules of succession prevailed. The incidents of such tenures will be described in the next chapter.

I now proceed to give you the history of some typical important impartible estates, so that you may have a complete idea of the subject. The history of the more important Rajes is the history of India. Unfortunately, none of them date back to the Hindu period, except the Rajput chiefs and perhaps the Rajas of Tippera and Manipore who claim descent from kings contemporaneous with the Pandus. It is difficult to believe their story but it is certain that there were Kings of Tippera and Manipore at that time. There were also the mighty Kings of Assam, mighty even in the time of Houen Thsang, who disappeared and were succeeded by Ahom Kings.

The great chief of Chitore or Udaypore has got a record of the doings of his family from very ancient times and the Annals of Rajsthan by Colonel Tod are perhaps, the only history of India in pre-Muhammadan times. The glory of the Hindus passed away with the defeat of Prithvi Raj of Delhi and the death of Amar Sing of Chitore, on the fatal field of Tirouri or Thaneswar. The Hindus have no histories.

The kaleodospic change of dynasties described before made the writing of history impossible. There could be no continuance of the records of kingdoms owned by various dynasties of various races. It is only from the copper plate grants that we glean some little information of some houses. All this is outside the scope of these lectures. This lecture has become more historical than legal. The history of customs however, it should be remembered, enables us to ascertain the true law. I shall now give you the history of some of the typical houses among Zemindars, and I shall finish my lecture with it.

First and foremost among chiefs is the Raja of Kharda. He represents the Gajapati Kings who ruled over a large portion of the Deccan and western Bengal, and maintained their independence till very recent times. They were conquered by the Muhammadans under Kalapahar, who in their turn were conquered by the Mahrattas and on the overthrow of the latter, came under the British. All the Gujrat chiefs and many chiefs of the Madras Presidency were their vassals. The present representative is a heavily indebted chief and it is not unlikely that the house will shortly be extinct.

Next, let us take the house of Ramgurh or Ichak. It is a very ancient Raj, originally of the nature of a principality. About the year

1772, Mukund Sing the then Raja was found in arms against the British Government and his estate was forfeited and bestowed upon another member of his family, by name Tej Sing, for his services, not of the most glorious kind, with the title of Maharaja and it has since then, descended to his heirs in the male line. On 17th November, 1813, in a suit concerning the property, it was declared by the Court of Sudder Dewany to be indivisible. In 1872, Maharani Hiranath Koer on the death of her infant son the then Maharaja, claimed by right of female succession but her claim was disallowed by the High Court (Maharani Hiranath Koer *v.* Baboo Ram Narayan Sing, 9 B. L. R. 305).

We next go to the Raja of Pareshnath. The house has existed from remote antiquity. The Rajas are the custodians of the shrine and the Jaina temples on the hill of Pareshnath. Though Hindus they exact homage from all Jainas visiting the shrine, for reasons now forgotten. Here we have got a house who might have enlightened the dark and ancient history of the Jainas but being cut off from the outside world in their native forests, they lapsed into semi-barbarism and have got no records of their own.

The house of Doomraon is the noblest in all Bengal. They claim direct descent from the great king Bhoja (6 Moore 187). Their principality is called Bhojpore, and their caste pre-

eminence as Chohan Kshatriyas is admitted on all hands. They preserved a sort of semi-independence during the Muhammadan period. We have got records of generations of chiefs who have all been Chohans. The present occupant of the Gadi is the widow of the late Maharaja.

We next go to the houses of Ramnagar and Hutwa. They have a remarkable history. Raj Ramnagar belonged at a time to Nepal. It represented one of the principalities in which ancient Nepal was divided under the suzerainty of its Kings. When Ramnagar was conquered by the Muhammadans, the Rajas continued to retain their possessions and when the English came, they accepted them as overlords. They were always semi-independent chiefs but became Zemindars under the British Raj. They are Nepalis by descent. The present Raja, who is the daughter's son of the late Raja, is a direct descendant of a king of Nepal.

The Hutwa or the Hunsapore Raj was an ancestral ancient tributary principality and it has been held as an entire estate in the same family for upwards of 200 years when the suit about it well known as the Hunsapore case, came before the Privy Council. The common ancestor was Raja Beer Sein and each successive possessor of the Raj during the whole of that period had been sole heir of the Raja last seized, and the eldest or nearest in the line of succession, without a single

instance of the succession of the relations of any heir succeeding as co-parceners or joint heirs to the ancestral estate. The other members of each successive Rajah being entitled only to an allowance out of the estate for maintenance and support. This course of descent to the rights in the Raj continued uninterruptedly down to one Rajah Futteh Sahee who, in the year 1767, was expelled from his possessions by force of arms, and the Raj was confiscated and taken possession of by the East India Company. From that period until the year 1790, the Raj remained in their possession, and they leased the same to farmers. In that year the East India Company after repeated applications by members of the deposed Rajah's family for its restoration, by a Firman granted the Raj to Chutturdharee Sahee, the representative of a younger branch of the family, and put him, then a minor, in possession, and afterwards conferred on him the title of Rajah. Rajah Chattardharee Sahee had issue of two sons, who predeceased him. The eldest Ram Sahee, left two sons Ongur Pertab and Babu Deoraj Sahee, him surviving, and the younger son Puthee Paul Sahee, also left two sons, named Tilluckdharee Sahee and Babu Beer Pertab Sahee. Ongur Pertab had issue a son, Maharajah Rajendra Pertab Sahee, whom it was alleged, Maharaja Chatturdharee Sahee, the day before his death, verbally appointed to succeed, to the Raj as his

heir, and installed him a Rajah. It appeared, that the Maharajah afterwards executed a written Will, or testamentary disposition, dated the 16th March, 1858, shortly before his death, appointing Maharajah Rajendra Pertab Sahee, his great grandson, his sole heir and successor to the Raj. The result of the protracted litigation was that Maharaja Rajendra Pertap's title was confirmed.

The house of Durbhanga has also a remarkable history. We know of the ancient Kings of Mithila and the law of the Mithila School which they administered. During the dark period of the Muhammadan rule, Sanskrit learning had its refuge in the mighty southern kingdom of Vijaynagar where Madhava flourished and in the kingdom of Mithila which maintained its independence even after the fall of Vijaynagar. Mithila was the last refuge of Sanskrit learning. Here flourished Udayanacharya whose genius and learning vanquished the Buddhists and the logic of whose arguments is even now considered irrefutable in India. It was here that Vachaspati Misra, whose learning and versatility rivalled that of Madhava, flourished. Then there was a time when Chandeswar the great minister of King Harising Deo, and the author of the Vivada Ratnakara, conquered Nepal and had himself weighed in gold by performing the Tula ceremony on the banks of the Bagmati river in the year 1315. Up to the fifteenth century, the house

of Mithila maintained its power. After that, the Muhammadans got the upper hand. One Mohesh Thakoor was a priest of the last king of Mithila when the country was conquered and the line of the old kings became extinct. Either Mohesh Thakoor or his disciple Raghunandan Thakoor went to Delhi and by his abilities or by representations now difficult to ascertain, obtained from the Emperor Akbar the Zemindary grant of Raj Durbhanga for Mohesh Thakoor. This was in the beginning of the sixteenth century. Since that time there has been an unbroken succession in the eldest male line of thirteen Rajas the custom supposed to govern the family being that one Raja abdicates in favour of his successor during his lifetime.

In the case of Soosung Durgapore, in Mymensing in Bengal, it appears that it was granted as a jagir or on military tenure to a Bengalee Brahmin by name Raja Ramjibon in 1650 by the Emperor Shah Jehan and was again conferred on his son Raja Ram Sing by a firman of the year 1680 granted by the Emperor Aurangzebe. In an early case before the Sudder Dewany Court, the estate was held to be impartible descending only to males. But in a later case, the Privy Council held that the custom had been abandoned and the ordinary rules of succession applied (Rajkissen Sing *v.* Ramjoy, 1 Cal. 190.)

Let us take two typical Madras Estates. The first one is the Shivagunga Zemindary which has been the subject of much litigation. It was created by Saadut Ally Khan Nabob of the Carnatic in the year 1730 and was given as an hereditary fief by him to Shasavarna Odaya Taver of the family of Nabooty of the Marawa caste as reward for his military services. Shasvaran was on his death succeeded by his only son Vadooganada who was killed in battle. Vadooganada had an infant daughter by his wife, Ranee Velu, but no other child. It appeared that two persons named Velu Murdoo and Cheima Murdoo then usurped the actual government of the Zemindary, and ultimately wrested from the Nabob of the Carnatic his acquiescence in the nominal tenure of the Zemindarship by Ranee Velu. Velu gave her daughter by Vadooganada in marriage to one Vengam Odaya Taver. The daughter died in giving birth to her first child, and the child survived its mother but a short period. Both died in the lifetime of the Ranee Velu, who was thus left issueless. It also appeared that the Appellant's father lived at Shivagunga with the Ranee, who, it was alleged, had adopted him. The parties who then appeared to be entitled to the Zemindary were two brothers, Oya Taver and Gowery Vallabha Taver, collateral descendants from the progenitors of

Shasavarna. Gowery Vallabha Taver was at this time about tweenty-nine years age. Oya Taver was his senior in years, but sickly and infirm. The two brothers were the nearest relations of Vadooganada, and also of Shasavarna. Vella Murdoo and Chinnce Murdoo, on the deaths of Ranee Velu, expelled Oya Taver and Gowery Vallabha Taver from the Zemindary and joined a rebellion against the Government. This rebellion was put down by the East India Company.

By the Treaty of the 12th of July, 1792, all sovereign power over the Poligar countries, including the Zemindary of Shivagunga, was transferred in perpetuity by the then Nabob of the Carnatic to the East India Company.

By a proclamation of Lord Clive, dated the 6th of July 1801, the Government transferred the Zemindary, which, it appeared was treated by the Government as an escheat for want of lineal heirs, to Gowery Vallabha Taver, otherwise called Permettoor Warrin Taver, or Woya Taver, who was collaterally descended from the progenitors of the first Zemindar, and appointed him Zemindar of Shivagunga.

By a Sunnud-*i*-milkeat Istimrar, or deed of permanent settlement, dated the 22nd of April 1803, the Zemindary was confirmed to Gowery Vallabha Taver to hold in perpetuity, with power to transfer the same by sale or gift,

on payment to the Government of a permanent annual Jamma. From the time of his investiture in 1801, until his death in 1829, Gowery Vallabha Taver continued the sole Zemindar. The estate has been the subject of much litigation and many suits, which have established that there many be two rules of succession in the property left by a person, the ordinary rule of inheritance applying to his self-acquired property and the rule of survivorship to his joint family impartible property, that the widow, daughter or daughter's son who is senior of his or her class succeeds to a Raj and other rules of Hindu law of impartible property which will be described hereafter.

Let us now take up the case of a Polliem Nargunty Polliem was an ancestral estate held on military tenure from the time of the Hindu Kings. It was held by a family of the name of Naidoo when the East India Company acquired the sovereignty of the District and assumed possession of all Polliems in the neighbourhood. They ultimately however, restored the Polliem Nargunty to the Naidoo family, different members of which were at different times Polligors or sole holders or managers. The Privy Council held that though it belonged to a joint family, it was impartible and the nearest male coparcener was entitled to succeed in preference to the widow of the last holder (9 Moore 66).

It is useless multiplying examples of various estates and tenures. Many of them will be dealt with later on when the incidents of impartible estates are described.

Lecture III.

We have to deal in this lecture with the incidents of impartible Rajes and other tenures. The first question we have to consider is, can impartible estates be joint family property subject to the rule of survivorship and having the incident of inalienability? We know that in ancient India, the kingdoms were kingdoms of certain families—the Kashis, the Panchalas, the Videhas, the Kurus, the Kekayas, the Yadus, the Haihayas and the like. We have no indication in the Puranas of a kingdom being considered as belonging to a joint family. In the Mahabharata, Duryodhana makes it clear by saying that if Yudisthira became king, he and his descendants would be merely his dependants. Some of the ancient kings divided their kingdoms among their sons (See Devi Bhagabat and Ramayana). We find in the Ramayana, Janaka saying that his younger brother was put in charge of affairs in his kingdom by his father and he conquered another king and placed him on the throne of the latter. Indeed, if a Raj be considered as joint family property, the brother of a Raja, if older than his son should

have the preferential right to succeed to the Gadi, like the Karta of ordinary joint Mitakshara family. But that was not the rule. Early cases no doubt established the rule that a Raj can have the incidents of a Mitakshara joint family property and a brother would succeed by right of survivorship excluding a widow. There is no indication of the rule of survivorship in the Smritis or in the ancient commentaries. The ancient commentators did not allow the widow any heritable rights. It was Vijnaneswara who for the first time established her right. Later commentators in their zeal to reconcile the conflicting texts of the Rishis, some excluding the widow and others declaring her right, laid down that the former applied to a joint family and the latter to a separated member. Among these commentators were some famous dialecticians, notably Vachaspati Misra, and we find them inventing a reason for the exclusion of the widow by laying down that in a joint family an individual member had no ascertained or ascertainable share and thus on his death the other members remained in possession of the entire family property in the very nature of the thing. But clever as it is, like all false reasonings, it has got a fatal flaw. All the Smritis and the commentators allow the son of a deceased member the right to step in his shoes and on a partition, the property is divided not *per capita* but *per stirpes*. This rule

is wholly inconsistent with survivorship. The question, therefore, still remains, if the son can represent the father in the joint family, why can not the widow of a sonless man. The ordinary rule of inheritance applies in the case of a joint family and the exclusion of the widow can not be explained by the dialectician's principle of the non-ascertainability of the share of a member. In any case, a Raj cannot be a joint family property. The Mimansa has very clearly laid down that a king was the holder of a divine office and neither he nor a subordinate prince has any property in his kingdom. Therefore, according to ancient Hindu Law, Rajes, if they be considered as remnants of ancient principalities, cannot be the property of their holders, far less can they be joint family property. It is, however, easier to set right a mistaken piece of legislation than to set right an erroneous decision of a Court. The Privy Council as early as 1864 in the famous Shivagunga case, held that an impartible Raj can be joint family property. But in that particular case, the property was held to be self-acquired and though there were no positive texts about succession to self-acquired property, it was held to be governed by the ordinary rule of inheritance and the widow succeeded.

The state of the law in 1872 is thus described by Sir Richard Couch in the case of Maharani Hira Nath Koer *v.* Ram Narayan

Sing (9 B. L. R. 323) "Markby J. referred to Katama Natchier *v.* The Rajah of Shivaganga (1) as an instance of a woman succeeding to a Raj, and near the end of his judgment said, that between impartibility and the exclusion of females, there is no connexion whatever. That need not be disputed. It is not upon the impartibility of the estate, but upon the family being undivided, and the law of succession to ancestral undivided property, that the exclusion of females rests. This appears clearly in the Shivagunga (1) and subsequent cases. The zemindari of Shivagunga was created in 1730 by the Nabab of the Carnatic; and by a proclamation of Lord Clive, dated the 6th of July 1801, the Government transferred the zemindari, which, it appeared, was treated as an escheat for want of lineal heirs, to Gawery Vallabha Taver, who was collaterally descended from the progenitors of the first zemindar. By a Sanad, dated the 22nd of April 1803, the zemindari was confirmed to him in perpetuity, with power to transfer it by sale or gift, on payment to the Government of a permanent annual jumma. By the decree appealed from the son of Oya Taver, the elder brother of Gawery Vallabha Taver was held entitled to the zemindari in preference to his surviving widow, on the ground that they were undivided brothers. In the judgment of the

(1) 9 Moore, 539.

Judicial Committee, page 605 of the report, it is said that the substantial contest was whether the zemindari ought to have descended in the male and collateral line, and the determination of that issue depended on the answers to be given to one or more of the questions :—first, were the brothers undivided in estate, or had a partition taken place between them? second, if they were undivided, was the zemindari the self-acquired and separate property of the younger? And if so, third, what is the course of succession, according to the Hindu Law of the south of India, of such an acquisition, where the family is in other respects an undivided family? From these questions, it is clear that the Shivagunga case (1) was different from the present ; and the decision in it is not applicable. But the law applicable to it is stated in the judgment at page 589 of the report where it is said that "if the Zemindar, at the time of his death, and his nephews were members of an undivided Hindu family, and the zemindari, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle." We have thought it right to refer to this case at some length on account of the reference to it in Markby J.'s judgment. Another authority for the exclusion of females, where the property is ancestral and the family undivided, is in the

(1) 9 Moore, 539.

judgment of the Privy Council in Jowala Buksh *v.* Dharum Singh (1), where it is said that Lall Sing, a nephew, whose legitimacy was disputed, if the legitimate male heir of the great ancestor, would have taken the Raj on the death of his uncle to the exclusion of the widow the property being assumed to be ancestral and the family undivided; that in the case of Katama Natchier *v.* The Rajah of Shivagunga (2), it was admitted that this would have been the course of descent according to the Mitakhara, if the property had been ancestral; and that the reason of that decision was that the Shivagunga Raj was the separate acquisition of the deceased. And in the judgment of the Privy Council in a later case, Rajah Suraneni Venkata Gopala Narasimha Row Bahadoor *v.* Rajah Suraneni Lakshma Venkama Row (3), it is again said that, in the Shivagunga case, the impartibile zemindari was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute, and the ruling of the Court was, that in the case the Zemindari should follow the course of succession as to separate property, although the family was undivided, but that if that Zemindari had been shown to have an ancestral Zemindari, the judgment of the Board would, no doubt, have been the other way. There is, however, a judgment of the Privy Council,

(1) 10 Moore, 533. (2) 9 Moore, 539. (3) 13 Moore, 113 at p. 140.

which is referred to by Markby, J. as the Tippera case, in which a different view is taken, and which we are unable to reconcile with the previous decisions. In Neelkristo Deb Burmon *v.* Beer Chunder Takoor (1), their Lordships say at page 540 of the report :—"Still when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law by judicial construction a fiction, involving also a contradiction, to call this separate ownership, and so to constitute a joint ownership without the common incidents of co-parcenership. The truth is, the title to the throne and the royal land is, as in this case, one and the same title ; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest ; for claims to an estate in lands and to rights in others over it, as to maintenance for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship where it varies from the ordinary title by heirship cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir." But in a later case, we find their Lordships adhering to the law laid down in the earlier cases. In the judgment in Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanu-

(1) 12 Moore 523, 3 B. L. R. P. C. 13.

mula Boochia Vankondora (1), after stating that the question upon which the parties in the suit joined issue and went to trial was, whether the family of which the plaintiff and the appellant's husband were members was an undivided or a divided Hindu family, and that the Courts below had properly decided that issue in favour of the plaintiff, they say: "Accordingly, the strength of the argument of the learned Counsel for the appellant has been directed to show that this case should be governed by that in the ninth volume of Moore's Indian Appeals, which is generally known as the Shivagunga case (2). They have gone so far as to argue that the estate in question in this case being impartible, must, from its very nature, be taken to be separate estate, and consequently that, according to the decision in the Shivagunga case the succession to it is determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided. The authority invoked, however, affords no ground for this argument. The decision in the Shivagunga case (2) will be found to proceed solely and expressly on the finding of the Court that the Zemindari in question was proved to be the self-acquired and separate property of Gowery Vallabha Taver." And after quoting from the judgment, they say: "It is therefore clear that the mere impartibility

(1) 13 Moore, 333. (2) 9 Moore, 539.

of the estate is not sufficient to make the succession to it follow the course of succession of separate estate. And their Lordships apprehend that, if they were to hold that it did so, they would affect the titles to many estates held and enjoyed as impartible in different parts of India." And in observing on the evidence as to the estate being the separate property of the appellant's husband, they say :—"These grants, by way of maintenance, are, in the ordinary course of what is done by a person in the enjoyment of a raj or impartible estate, in favour of the junior members of the family, who, but for the impartibility of the estate, would be co-parceners with him." This judgment is closely applicable to the present case. There is here an ancestral impartible estate and an undivided family, for there is no proof that the family of Tej Sing had become divided, and no issue was raised as to that. If there had been no evidence of custom in the case, we should have held, upon the authority of the decisions we have referred to, that the plaintiff is entitled to succeed to the estate.

The evidence oral and documentary, is fully stated in the judgments in the Division Court, and it is not necessary to re-state it. It shows that on the only occasions since the grant of the estate of Tej Sing, when a female might have inherited she was excluded. It is true that, in both cases, a brother succeeded in pre-

ference to the widow of the deceased, but this could only be justified by the family being an undivided one ; and the undivided family was not that of Sidnath Sing, the father of the brothers, but of Tej Sing, of which family the plaintiff is a member. And that this succession was not allowed, as was argued by the appellant's counsel, because a brother was to succeed, is we think shown by the return made by Shambunath Sing on the 25th June 1846, in which he acknowledged the plaintiff as heir next in succession to his surviving brother, Ramanath. The planitiff's claim is, therefore, supported by such evidence as there is of a custom in the family. It does not, in our opinion, depend upon a local custom, and probably the instances which appear to be evidence of a local custom may all be explained by the rule of law which, we think, is established by the authorities we have quoted. The judgment of Markby J., for the defendant appears to be founded on the assumption that the succession was governed generally by the rule of inheritance of separate property according to the Mitakshara, treating separate as if it were self-acquired, and this is supported by the judgment in the Tippera case—Neelkristo Deb Burmono v. Beer Chunder Thakoor (1) ; but all the other authorities appear to show that this is not correct. Where the property is ancestral

(1) 12 Moore, 523

and the family undivided, a custom modifying the law must be a custom to admit females, not a custom to exclude them." Subsequent cases of the Privy Council have established that an impartible estate can be joint family property in which the Mitakshara rule of survivorship applied (1).

In the case of Raja Ram Narain Sing, *v.* Pertum Sing (2), in 1873, the Calcutta High Court held that in an impartible ancestral Raj, the father could not alienate property except for justifying necessity as in an ordinary Mitakshara joint family.

In 1874, however, the Calcutta High Court came to a different conclusion in the case of Kapil Nath *v.* Government. (3) The Privy Council in the case of Sartaj Kuary *v.* Deoraj Kuary (4), held that the son was not a co-sharer with the father in the case of an ancestral impartible Raj. In that case, their Lordships of the Judicial Committee thus define the nature and incidents of an impartible estate under the Mitakshara Law :

"The Judges of the High Court have quoted, in support of their view, passages from several judgments of this committee. In all of them

(1) Raja Rup Sing *v.* Rani Baisni in 11 I. A. 154. Choudhury Chintamoni Sing *v.* Noulukho Koer, 2 I. A. 233. Rani Parbati *v.* Jagadumba, 29 I. A. 96.
(2) 11 B. L. R. 397.
(3) 22 W. R. 17.
(4) 10 All. 272, 15 I. A. 51.

the question was as to the succession to the property on the death of the Raja or Zeminder, and it was held, that for the purpose of determining who was entitled to succeed, the estate must be considered the joint property of the family. The saying in the Shivaganga case (1) "the Zeminderi, though impartible, was part of the common family property," must be understood with reference to the question which was then before their Lordships. The question of the right of an eldest son or other son to control the father did not arise in that case. In Periasami *v.* Durga Kunwari (2) it is evident from what is quoted by the High Court that this question was not considered. In Periasami *v.* Periasami (3) the language is more guarded. It is said that the estate, though impartible, was up to the year 1829 in a sense the joint property of the joint family of the three brothers. The sense is shown by the previous sentence to be the younger brothers "taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a raj or other impartible estate descendible to a single heir." In Rajah Yanamulah Venkyamah *v.* Rajah Yanamulah Bocchia Vankondora (4), which was quoted in the argument for the respondent for a passage in the judgment at page

(1) 9 Moore at p. 593.
(2) 4 Cal. 201.
(3) 5 I. A. 61.
(4) 13 Moore 333.

339, where the estate is spoken of as being part of the common family property, though impartible, the question in the suit being in regard to the succession, their Lordships at page 340, after noticing evidence of the grants of portions of the estate, say!—"These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a Raj or impartible estate in favour of the junior members of the family, who but for the impartibility of the estate would be co-parceners with him." This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the coparcenary in it which under the Mitakshara Law is created by birth, does not exist.

"And in Baboo Beer Pertab Sahee *v.* Maharaja Rajendra Pertab Sahee (1) the case of the Zemindari of Hansapore in Behar, where the Mitakshara Law prevails, an impartible raj, which by family usage and custom descended according to the rule of primogeniture, subject to the burden of making Babuana allowances to the junior members of the family for maintenance, the question was whether the Raja had power to make a testamentary disposition of raj to one member of his family to the prejudice of his other male descendants and co-heirs, their Lordships held that the foundation of the supposed

restriction on the power of the father to make a will was the community of interest which the members of the family acquired by birth, and said "cessante ratione legis cessat et ipsa lex."

"The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons. "Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation since the estate is in common." (Mitakshara, Ch. 1, S. 1, V. 30).

"The argument in support of the view of the High Court appears to be that although the sons do not take an interest by birth, so as to enable them to hold the estate or to have a partition, they have, as members of a joint family, some interest which is sufficient to enable them to prevent an alienation. The learned Judges of the High Court say: "It must be conceded that the complete rights of ordinary coparcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, are merged in, or perhaps, to use a more correct term, subordinate to the title of the individual member to the encumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a suffi-

ciently substantial form to preserve for them a kind of dormant co-ownership.

"In the case on the 11th Bengal L. R. 397, it seems to have been considered that the son was a co-sharer with the father. It is said (p. 405) in the judgment: "It appears to me, then, on the facts with which we have to deal, that we must take the property which is the subject of suit to have been ancestral property, which descended with the joint family in the ordinary way, subject to the effect of an established custom in regard to its partibility among the existing joint members of the family, and in this view of the facts it is evident that the father had no power against his son, who was unquestionably joint with him as regards this property, to alienate or encumber the estate excepting upon a justification of a family necessity." Both Courts appear to have thought that, in order to prevent alienation by the father, there must be a co-ownership in the son or sons.

"The property in the paternal or ancestral estate acquired by birth under the Mitakshara Law is, in their Lordships' opinion, so connected with the right to a partition that it does not exist where there is no right to it. In the Hansapore case, there was a right to have Babuana allowance as there is in this case, but that was not thought to create a community of interest which would be a restraint on alienation. By the custom or

usage the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership, which is a restraint upon alienation. It is not so difficult where the holder of the estate has no son, and it is necessary to decide who is to succeed. In Bengal there is joint family property, but where the property is held by the father as its head, his issue have no legal claim upon him or property, except for their maintenance. He can dispose of it as he pleases and they cannot require a partition : Dayabhaga, Ch. 1. In the case of the Raja of Patkum in Chota Nagpore, which was admitted to be an impartible raj or one in which the custom of primogeniture existed, it was held by the High Court of Calcutta (1) that it is necessary for the plaintiff to show that there was some custom which would prevent the operation of the general law, empowering alienation, and that proof of a custom that the estate descended to the eldest son to the exclusion of the other sons was not sufficient. On an appeal from this judgment this Committee was of opinion that it should be affirmed (2). In Narain Khootia *v.* Lokenath Khootia (3) it was held by the same High Court that the fact that the raj of Chota Nagpore is

(1) 5 Cal. 113. (2) 8 I. A. 248. (3) 7 Cal. 461.

impartible does not prevent the Maharaja for the time being from making grants of portions of it in perpetuity. And it is stated in the judgment that the family is governed by the Law of Mitakshara. It had previously been held by the same High Court in a case in 13 Bengal L. R. 445 where the plaintiff alleged that the descent of the estate was governed by Mitakshara Law, and that by the usage and custom of the family the estate was impartible and descendible according to the law of primogeniture on the male heirs of the original grantee, the estate was not in the case stated shown to be inalienable. Their Lordships think that this is the correct view." (1).

In the latest case on the question, Vencata Surya *v.* Court of Wards, (2) the same rule was affirmed and was stated in the following words: "The property in the paternal or ancestral estate acquired by birth under the Mitakshara Law is so connected with the right to partition that it does not exist where there is no right to it."

We have seen before that the Privy Council in the Tippera case, held that the incidents of a joint family were inapplicable to an impartible estate. As Sir Richard Couch said in the case of Maharani Heera Nath Koer, that decision is in conflict with the other decisions of the Privy Council. Let us, therefore, consider the matter fully. It has been authoritatively held

(1) 10 All. 285. (2) 26 I. A. 83, 22 Mad. 383.

by the Privy Council in several decisions that the son has no right by birth in ancestral impartible property and that there is no joint ownership between the father and the son so as to give to the son the right to prevent an alienation by the father. Now if there is no co-ownership as between father and son in a Mitakshara family, there cannot be any co-ownership between two brothers in an ancestral impartible Raj. No difference can be made in this respect between a son and a brother. The right of survivorship is based on co-ownership. If the latter does not exist, the former also fails. Survivorship and incapacity to alienate are both based upon one and the same principle by the commentators of the Mitakshara School—a principle which, though it is not based on the Smritis, has been accepted as a sound and binding principle of Hindu Law by the Courts. That principle is that all member of a joint family have proprietary rights over every portion of the property, which are incapable of definition before partition. Indeed, the decisions which declare the alienability of ancestral impartible property are quite inconsistent with the decisions which declare that an impartible estate can be a joint family property. But in the latest case on the point the Privy Council have again affirmed the rule of the law of the old decisions (Sreemati Rani Parbati *v.* Jagadish, 29 I. A. 96.) where it has been held

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that a Raj may be a joint family estate to which the right of survivorship apply.

According to true Hindu Law as is laid down in the Mimansa, a Raj is not alienable. We have also seen that all Rajes belonged to certain families, the Kashis, the Panchalas, the Kurus, the Raghus and the like, and could never go out of them. The Salic law was applicable in India as among the Germanic nations, and is still applicable to the Rajpoot independent states, as is mentioned by Colonel Tod. The true rule therefore, is that a Raj is inalienable and always goes in the male line, unless a custom to the contrary is proved. But it does appear that in very ancient times the king sometimes divided his kingdom among his sons and sometimes set aside an incompetent elder son in favour of a younger son, You all know the story how Yayati gave the kingdom to a younger son Puru. In the case of Rama, the right of the father was admitted, but the selected younger brother would not take the Raj, because it was the Kulachar (and not law) of the Ikshakus that the eldest brother always took. It is however admitted on all hands that the eldest leading a vicious life could and should be excluded as in the instance of Ansuman. In the Debi Bhagabat a Purana however, it is laid down that the elder brother can be excluded only when he has become a *Patita* or outcaste.

However that may be, as the law now stands upon the decisions, a Raj may either be a joint family Raj carrying with it the right of survivorship or a separate Raj in which the widow or the daughter may succeed as under the ordinary rule of inheritance. We have also seen before that it is now well established that an impartible estate is alienable unless a custom to the contrary is proved. The rule was established by the Privy Council in case of Udayaditya *v.* Jadub Lal (8 Cal.) and has since been affirmed in several cases. In the Madras Presidency, till 1889, the decisions were against the power of the holder of an impartible estate to alienate. But the Privy Council in 1899, held that the rule in Udayaditya's case and Sartaj Kuary's case applied to Madras also. Their Lordships make the following observations in connection with the Madras decisions which are very instructive :

"The earliest reported case is a judgment of the Sudder Adawlut in the note, 3 Knapp, 89. The marginal note to it is : "A grant made by a Zemindar in 1804 of a part of his Zemindary which he held at that time under an eight years' lease, and which was afterwards confirmed to him upon the permanent settlement, is valid as against himself. Semble, such a grant would not be valid against his successors or against Government." The judgment is founded on S. 8 of Regulation XXV. of 1802. It says :

"Sec. 8 provides for the payment of the public assessment on all separated portions of a Zemindary by a grantee if the transfer be regularly made, and, if otherwise by the grantor: and as a protection to the heirs the validity of the transfer is made to depend on its being conformable to the law of the parties and the regulations of the Government"; and by Sec. 12 Zemindars are declared absolutely incompetent without the previous consent of the Government to make any appropriations intended for the purpose of electing a permanent reduction of the permanent assessment of their Zemindaries. It is then said by the Court: "The clear and obvious intent of the restriction in question, as well as of the corresponding legislative enactments, being to defeat improper alienations to the prejudice of the rights of the Government or of the successor to the estate, it follows by a common rule of construction that such alienations are viodable on the determination of the interest of the person who makes them." This is right if it applies only to alienations, which are not "conformable to the law of the parties or the Regulations of the Government or not made with its consent." If it goes beyond that, it is, in their Lordships' opinion, erroneous, and not justified by the sections referred to, the object of the Regulation being apparently, to keep the assessment permanent. There is no rule of construction which

authorises it. The judgment was given in 1822. The next was in 1849. It is in the decisions of the Madras Sudder Adawlut in that year, p. 51. It was in a special appeal from the decision of the Civil Judge of Nellore, heard by one judge of the Sudder Court. The claim in the suit was for the recovery of an allowance under two grants originally made by the defendant's grandfather, and subsequently renewed by the succeeding inheritors. The Civil Judge had reversed the decision of the Munsiff in the plaintiff's favour, and the Sudder Court confirmed his decision, saying: "In a somewhat similar claim"—which appears from the note in the margin to be the case before noticed—"to the one under consideration, in which the same principle was involved, the Court of Sudder Adawlut decided that, as the obvious intent of the laws in force was to defeat improper alienations of land or the produce of land to the prejudice of the rights of the Government or of the successor to the estate, it follows by a common rule of construction that such alienations are voidable on the determination of the interest of the person who makes them." There is a similar decision in the Sudder Reports, Madras, in 1861. In 1862 the question came before the High Court of Madras in a special appeal. (1) The Court after considering Ss. 8 and 12, decided it in the same way saying

(1) 1 Mad. H. C. 141.

that this construction of the Regulations was supported by the observations of the Court in the case No. 6 of 1821 (1), in giving judgment on the point for decision in that case, which was different from the present. There are two other cases in the same volume (2), in which the decision was followed, the whole appearing to rest upon the supposed rule of construction. The next case is in 2 Madras, H. C. R. 128. In that it was held by the High Court of Madras that the ratio decidendi of all the cases, down to the two latest, clearly was that a Zemindar upon the permanent settlement had really an estate analogous to an estate tail, as it originally stood upon the Statute de donis. This was introducing into the law of the Madras Province what is said in Tagore *v.* Tagore (3) to be "a novel mode of inheritance, inconsistent with the Hindu Law." In the next case (4) it was held (Holloway J. dissentiente) that where a Zemindar alienated a part of the zemindary, and the terms of Regulation XXV. of 1802, S. 8, were not complied with, the alienation was invalid against his grandson. Holloway J. said, with reference to the decision of the Sudder Court, that they professed to be based upon the decision of 1821 (1822 ?), and that the Court held the settlement to be in the Zemindar for his life,

(1) 3 Knapp, 29. (2) (1863), Mad. H. C. 349, 455.
(3) (1872) L. R. Ind. Ap. Supp. Vol., p. 74.
(4) 3 Mad. H. C. 5.

with remainder to his heirs and successors in perpetuity. "They held the words 'heirs and successors' as an English property lawyer would say to be words of purchase and not of limitation." The next case referred to by Mr. Mayne (1) was a case of self-acquired property, and has no application to the present. After this, the doctrine of the estate tail seems to have been abandoned, for in the next case, decided in 1867 (2), the High Court held that it was clearly the law that the usage of succession to Zemindaries in the Presidency of Madras by a single heir by primogenitureship did not interfere with the general rules of succession further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family—that being all that the purpose of the usage, namely, the preservation of the estate as an impartible raj, renders necessary. The unity of the family right to the heritage is not dissevered any more than by the succession of coparceners to partible property, but the mode of its beneficial enjoyment is different." This was taking a very different ground from what was taken in the previous cases. According to it, the holder of the Zemindary has not a life estate in it, the Zemindary, though he is in sole possession of it, being by a

(1) 4 Mad. H. C. 463. (2) 6 Mad. H. C. 93.

kind of legal fiction the property of the family, and each member of it having a share in the property although he can do no act as proprietor. The next case is in 8 Mad. H. C. R. 157, where a similar opinion is stated. It is said (1) of the holder of an impartible estate, descending to a single heir who was a member of an undivided family, subject to the law of the Mitakshara, that the estate held by him, although subject to the peculiar incidents of such an estate, and possessed by him free from coparcenary rights in others, was not entirely at his disposal; that "he should be regarded as possessing only the qualified powers of disposition of a member of a joint family with such further powers, or it may be with such restrictions as spring from the peculiar character of his ownership, and that these powers fall short of a right of absolute alienation of the estate." It is to be noticed that here the estate is said to be possessed free from coparcenary rights in others. This is not consistent with the view in the former case, that the estate, whilst in the possession and enjoyment of one person, is still the property of the family in which each member of it has a share. There is a remarkable divergence of views in these judgments which their Lordships think deprives them of much authority. In the case of Beresford *v.* Ramasubba (2) the alienability of an im-

(1) 8 Mad. H. C. 177. (2) Ind. L. R. 13, Mad. 197.

partible zemindary came again before the Madras High Court on appeal from the decision of a Judge sitting on the Original Side. He had followed the decisions in 4 and 6 Mad. H. C. R., and made a decree declaring a mining lease by the owner of an impartible Zemindary void The two Judges of the Appellate Division of the High Court held that they were bound by the decisions of this Committee in Rajah Udaya Aditya Deb *v.* Jadab Lal Aditya Deb (1) and Sartaj Kuari *v.* Deoraj Kuari (2), and remanded the case to try whether by family custom the Zemindary was inalienable for purposes other than those warranted by the Mitakshara law. This decision was in 1889. In the present case the High Court has said it is bound to act upon the doctrine laid down by the Judicial Committee, and refers to the distinction made by the Judicial Committee between a matter of succession by inheritance and a question of alienability. It is not necessary now to dwell upon this, as in the argument of this appeal an entirely new view of the question was taken. Mr. Mayne has said that there was a custom co-extensive with the province of Madras with regard to every impartible Zemindary, that a course of decision had established a custom, a long series of decisions not resting upon the Mitakshara law. Their Lordships have felt a difficulty in apprecia-

(1) (1881) L. R. 8 Ind. Ap. 248, (2) L. R. 15 Ind. Ap. 51.

ting this argument. It assumes that throughout the province of Madras the law laid down in those decisions, which, until they were reversed by the higher authority, were the law of Madras, was obeyed. The supposed custom followed the law. Their Lordships were referred to 14 Moore, Ind. Ap. Ca. 585, as shewing what was a valid custom. There it is said in the judgment with reference to long established usages existing in particular districts and families in India, that it is of the essence of special usages modifying the law of succession that they should be ancient and invariable. This custom now relied upon did not modify the law. It had no force independently of the law. There is no proof here of any custom or usage against alienation, which the Courts of India should recognise as having the force of law." (1)

It is thus a settled rule of law in all the Presidencies that, without a special custom to that effect, an impartible estate is not inalienable. It was however, for sometimes open to doubt whether impartible estates were alienable by way of testamentary dispositions. The matter has been set at rest by the Privy Council by holding that no distinction could be made as between the power of alieenation *inter vivos* and alienation by way of testamentany disposition (2)

(1) Vencata Surya *v.* Court of Wards, A. 26 I. A.
(2) Vencata Surya *v.* Court of Wards, 26 I. A.

The question what constitutes a joint family Raj is a very important and difficult one. The whole matter is discussed in detail in the judgments of the case of Sartraj Kuar, that of Raja Yanumula and of the Bettia case, quoted before. The holder of an impartible zemindary has got no life estate in it but has an absolute interest and it is by a kind of legal fiction that the property is the property of the family, the members of which "taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a Raj or other impartible estate descendable to a single heir." The position is further made clear by their Lordships of the Privy Council who say that the junior members are entitled to maintenance grants, but "these grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a Raj or impartible estate in favour of the junior member of the family who but for the impartibility of the estate would be coparceners with him" in the estate which though an impartible one "may be for some purposes spoken as joint family property, but in which the coparcenary which under the Mitakshara law is created by birth does not exist." It is difficult to conceive how else there can be any coparcenary giving rights of survivorship. However, according to the decisions, a Mitakshara joint family impartible estate is one to which the

holder for the time being is absolutely entitled, having rights of alienation, until a custom to the contrary is proved, the junior members having rights to maintenance and survivorship as in an ordinary Mitakshara family and the female heirs being, as a consequence of it, excluded. Chief Justice Scotland in Yenumula Garuridevamma Gain *v.* Yenumulu Ramandorg Gain (Mad. H. C. Reports 93) well describes the position in these words: "Instead of the several members of the family holding the property in common, one takes it in its entirety and the common law rights of the others who would be coparceners of partible property are reduced to rights of survivorship to the possession of the whole dependent upon the same contingency as the rights of survivorship of coparceners *inter se* to the undivided share of each and to a provision for maintenance in lieu of coparcenary shares." (1) If the position be correct, in respect of an ancestral impartible estate, the junior members of the family, if in the enjoyment of maintenance grants can never be considered as separate so to lose their rights of survivorship. But it has been held that something more that being descended from a common ancestor must be proved in order to establish joint family rights. Residence in the Gur *i.e.* palace or fort, enjoyment of maintenance and living together as joint members and

(1) See Thakur Kapil Nath *v.* Government, 22 W. R. 17.

the like are necessary to constitute a joint family. No doubt when brothers live, like the Pandavas or Rama and his brothers, having nothing separate and enjoying the whole Raj with the eldest brother, who is obeyed by them as by his other subjects, but who nevertheless participate in the Raj practically on equal terms with the eldest brother, it would be absurd to consider the brothers as divided. But when the brothers live apart from each other, the younger brothers having separate residences and separate maintenance grants, they should be considered as separate. It would be absurd to consider all the descendants of a remote ancestor always as members of a joint family. According to an ancient text of Devala, all descendants of a common ancestor should be considered as separate in the fourth generation. The rule of Devala has not been considered as good law in principle, but for all practical purposes it is good, as a contrary state of things is seldom found in these days. However that may be, separation which is the result of partition is not possible in principle in a family which owns only impartible property, and even when it owns both partible and impartible property, division of partible property, it has been held, does not constitute separation as regards the other property. But it has been held that there may be separation as regards impartible property. How is that separation to

be proved is difficult of apprehension. When there is a deed of separation or a deed by the junior brother relinquishing his rights as a member of the family and rights of residence in the family dwelling house and accepting maintenance grants descendible to children, there is certainly separation. When also several generations have lived in separate houses and in separate enjoyment of maintenance grants, they should be considered as separate. But when only the members are removed from one another by one or two degrees, when they live in the palace or *gur* or in houses provided by the Raj, when the expenses of marriage and other ceremonial expenses of the members of their family are borne by the holder of the estate, when the maintenance grant is not of a nature which precludes the idea of jointness, when the worship is joint, *i.e.*, when the junior members do not set up separate images of gods which are periodically worshipped or worshipped as special gods of the family by Hindus, the family should be considered as not having separated.

According to the Rishis, the eldest brother, when he succeeded to the entire estate, was under the obligation to maintain his younger brothers like a father. The five Pandavas were all equal as regards the enjoyment of the profits of the Raj, with this exception that in all ceremonial matters, Yudhisthira the eldest was the figurehead. He was the chief, the master of the bodies even, of his

brothers who had to obey him in all matters. But everything of worldly possessions or merit acquired by religious ceremonies was common to all. They were supposed to have one queen who was the common wife of the five brothers, probably a figurative narration showing how strong was the bond binding the brothers, for the custom of polyandry was unknown among Hindus and prohibited by the Vedas. Rama and his brothers lived in perfect amity as joint brothers, though Rama was lord of all. The nephews, however, had to be provided and they had separate kingdoms given to them.

The custom among Rajput kings is similar. But the old ideal of the brothers having everything in common is too high for work-a-day life. Thus it is we find that in Rajput kingdoms, the younger brothers had to be given fiefs descendible to their children, held on military tenure. Every younger brother and his children had a right to be maintained like royal princes, if they chose to live with the Chief. But they always had fiefs granted to them and thus according to custom they could demand *permanent and heritable* grants of land to be made to them, of quantity and value sufficient to maintain their dignity. A Raja, if he had many children, thus greatly weakened his principality. In ancient times, when the dignity of a family depended on the number of swords it could command, it was not a disadvantage. Take.

for instance, Yodha of Marwar, whose representative could command one hundred thousand swordsmen, all 'sons of Yodha,' and who kept at bay the Great Moghul while at the noon-day splendour of his power. But now swords and strong arms count for nothing and a poor king, like Rana Protap, who ate on leaves of trees, though master of thousands of devoted warriors, would be despised. The result is that younger brothers have come to be considered as incumbrances, who weaken a Raj and every effort is made to cut down their allowances. English Judges have come to the help of the Chiefs by importing the English idea that younger sons have no rights whatsoever to the land. Younger sons of holders of impartible estates have thus been reduced to a very pitiable plight. They have been held entitled to maintenance but such maintenance as would not weaken the Raj and probably not more than what a widow would get. A junior member is entitled to such maintenance as would enable him to maintain the dignity of his family and to support himself and his children. It has been held that "while on the one hand the allowance to be fixed for the junior members is not to be such as to cripple the Raj, it must on the other hand be proportionate to the fair wants of a person in the position and rank in life" of such members. (1) According to the rule laid down

(1) Mahesh Pertap *v* Dugpal, 21 All. 232.

in the Sukra Niti, which is considered a binding authority on the subject according to the Mahabharata, the younger sons are entitled to get one-fourth of the kingdom by way of fiefs. (1)

Maintenance grants again, have been held to be only life grants ceasing with the life of the donor or the donee, except when they are expressly made descendible to heirs. Here again a Muhammadan principle of law according to which all jagirs are for life and an English principle that maintenance grants are only life-grants have been grafted into Hindu Law without a true appreciation of its principles.

Maintenance grants to junior members, in ancient times and in modern times in old independent principalities, were always grants descendible to male children, resumable on failure of issue male. The custom of Chotanagpore about jagir grants called Putrapautradik, was the law of the Hindu Rajes. It is however, too late now to contend in our Courts that maintenance grants without express words of inheritance are descendible to children. The result has been the abject poverty of many scions of ancient Rajes. It is however, now too late to contend that junior members of a family are entitled to claim and to receive by suit maintenance grants descendible to children.

Let us proceed to decided cases on the

(1) Sukra Niti, Ch. I. 347.

question. The earliest reported case is that of the Collector of Bareilly *v.* William Charles (Macnaghten, Vol. II., p. 188) decided in 1816. It was decided that a tenure by Jagir is neither alienable nor hereditary and is considered as a life grant merely, as far as regards the exemption from public assessment. It was based on the principle of Muhammadan law that all assignments of public revenue can only be for life, the Kheraj being inalienable. Hereditary offices were unknown among Muhammadans, while they were very common among Hindus. All village offices under the Hindu system were hereditary. Even the office of the priest, the most important in a royal household, was hereditary. It appears that the higher offices of minister and commander of the army were also very often hereditary. But there is no indication that any grants were for life only. The inalienability of the public revenue is a principle common to all systems of law. The essentially democratic social system of the Muhammadans made the principle an immutable one. Under the Hindu system, the hereditary nature of many offices greatly modified the principle in practice and, life-estates were unknown to Hindu Law, except in a certain sense in the case of widows. All grants of land made by Hindu kings were hereditary. I know of no exception to the rule. The copper plates make no mention of limited grants nor is there

any thing in the ancient books showing their existence in ancient times.

However, the Muhammadan principle was given effect to by many Hindu kings and chiefs during the Muhammadan period and when the English came, they were ignorant of the original customs of the Hindus and they found it easy to administer the Muhammadan law on the subject, especially as it agreed with the English rules of construction of such grants.

In 1816 the Sudder Court held that a tenure by Jagir is neither alienable nor hereditary and is considered as a lifegrant merely as far as the regards exemption from public assessment.(1) The rule laid down in 1816 has since been invariably followed. It has been held that such grants enure during the lifetime of the grantee and even of the grantor.(2)

Junior members have also a right to get the expenses of their sons' and daughter's marriages and other *sanskaras* or ceremonies which have to be performed for them according to the ordinances of the Smritis. (3) Widows of junior members have a right to receive maintenance, like widows of disqualified heirs and also to receive money

(1) Collector of Bareilly *v.* William Charles, Macnaghten's Reports, Vol. II., p. 188.

(2) Bhya Dirgagdeo *v.* Pandey Fateh Bahadoor Ram, 3 Cal. L. J. 521. Anund Lal *v.* Dheerag, 5 Moore 82. Beni Prosad *v.* Dudnath, 27, Cal. 156 P. C. Woodoyaditya Deb *v.* Makoond Narainaditya Deb, 22 W. R. 225. Bir Chandra Manikya Bahadoor *v.* Ishan Chander Thakur, 3 C. L. R. 417.

(3) Laksmipathi *v.* Kundaswami.

enough for performing the marriage ceremonies of daughters and for giving them proper ornaments and necessary presents to their husbands. (1) They have also a right of residence in the palace or to receive a suitable house instead.

Sons of predeceased younger brothers have also a right to maintenance, like their fathers. Hindu Law makes no distinction in this respect as to the liability of the head of a family, whether its property be partible or impartible.

We next go to the question of the extent of the power of the holder of an impartible estate to make grants of land. The question arises only in the case of inalienable estates. In ancient times, all land was inalienable, either as belonging to a family or as belonging to an impartible Raj or tenure. But it was not inalienable for religious, charitable or other purposes allowed by ancient custom. Numerous copper plates bearing dates before and after the Christian era, show that kings and smaller chiefs made grants of land to Gods, Brahmins, bards, public officers, feudal lords, junior members of the family, sons-in-law and daughters. Grants for religious and charitable purposes were also allowable. But no one could so alienate property for any purpose whatsoever as to weaken the kingdom or principality. Small grants made for necessary purposes and made bonafide such as might be

(1) Beerpertab *v.* Rajender Pertap.

made by a prudent owner were only allowable. From the time of the great king of the Ikshakus Dilipa* till the time of Harshavardan, we read of a certain periodical ceremony by which kings gave away in charity all they possessed, except the entire kingdom which was inalienable. Over moveables the chiefs had entire control but lands were alienable only within reasonable limits and for purposes allowed by the Smritis and custom. The Smritis allow grants to the daughter and the son-in-law, and to Brahmins and Gods. By custom, grants to junior members, (who had a right to maintenance according the Smritis), to public officers, to bards, to hereditary menial servants, and for the maintenance of the establishments of temples with their paricharakas, officiating priests and dancing girls were allowable. The Puranas and ancient copper plates establish the custom. Then again there was the custom of making grants for perpetual feeding of guests, Sanyasis and beggars, called Sadabrat. Such Sadabratas were established by specially charitable persons and were very often appurtenant to great religious establishments of Sanyasis. We have thus seen what according to Hindu Law and custom, was the nature and extent of the power of alienation of immoveable property by holders of impartible estates.

* He performed the Visvajit Yajna. Jarmini refers to this Yajna in the Mimansa Darsana 6 and 7-2 and says that the kingdom is not alienable.

It must not be understood however, that the powers of a holder of an impartible estate are like those of a Kurnarvan of a Madras Tarwad or Illam. There every member is an owner. In an impartible estate, the only proprietor is the holder for the time being and his estate is descendible to one of his heirs as prescribed by law or custom, who takes as owner subject to liabilities mentioned above.

In respect of service tenures granted by a holder of an impartible estate, he has the right to resume it on the death of the tenant and the successor in the Zemindary has also the right to resume it at his pleasure. A question of great difficulty arises as to the date from which limitation will run against the Zemindar, which will be dealt with hereafter.

The next question of importance is that of the power of the Zemindar over accumulations. The law of accumulations as laid down by the decisions of our Courts in regard to widows is applicable pari-passu to owners of impartible and inalienable estates. In case of alienable estates, accumlations as well as, the corpus of the estate can be disposed of at the pleasure of the holder and the application of the law of accumulations arises only when the ordinary rules of inheritance would not be applicable in regard to them.

In regard to personal property in alienable or inalienable estates, all accumlations should be

considered as partible property to be taken by all the heirs according to the ordinary law of inheritance, for it is clear from instances from the ancient history of India that the Chief had absolute power of disposal over moveables and there can be no presumption that when a Raja saves or acquires money, he intends to forego the power of disposal over it by making it a part of the ancestral estate, especially when he has no male issue.

I have already told you of the Putrapautradika grants of Chotanagpore. In Madras, it has been held that a maintenance grant on these conditions is an absolute heritable grant, and the condition as to its lapsing on failure of male issue contravened the principles of the Tagore Case. (*a*) It is difficult to see why the ancient custom of Hindu Rajes that in case of maintenance grants on failure of male issue of the grantee they should revert to the parent estate, can not be given effect to.

As regards jagirs in the case of Putrapautradika jagirs of Chotanagpore, they are held to be impartible and revert on the failure of male issue to the grantor. In the case of a maintenance grant, a junior member of the family of the Chotanagpore Raj, it was found that by custom it was impartible, the eldest son becoming the Thakoor, the junior members being

(1) Vencata Kimiaru *v.* Chellangame, 17 Mad. 150.

entitled to maintenance grants, and that on failure of male issue of any one of these junior members the grant reverted to the Thakoor (Jeetnath Sahee Deo *v.* Lokenath Sahee Deo, 19 W. R. 239.) Other jagirs are ordinarily held to be for life and the question of impartibility does not arise in regard to them. But when they are heritable they are ordinarily considered as partible. But in case of military Jagirs it would be difficult to say that they are partible. The Sushung estate was originally a military jagir. It was once held by the Sudder Dewany Adalat to be impartible but later on it was held by the Privy Council to be partible (Rajkissen Sing *v.* Ramjoy Surma Mozoomdar, 1 Cal. 186 P. C.)

Vatans in Bombay are hereditary service tenures granted by the previous rulers of the country to village and district officers. They are ordinarily inalienable. The incidents of such tenures are governed as a rule by Bombay Acts 2 and 7 of 1863, 3 of 1874 and 5 of 1886.

It will be convenient to consider what was the nature of the estate of a holder of a Vatan appendant to an hereditary office before the subject engaged the attention of the Indian Legislature in 1827. The question is discussed by Westropp. C. J., in Krishnarav Ganes *v.* Rangrao (1), and the conclusion arrived at by the learned Chief Justice, on the authority of

(1) 4 Bom. H. C. A. C. J. p. 12.

Mountstuart Elphinstone's Report on the territories conquered from the Peishwa and the decision of the Sadar Adalat, is that, both as to civil hereditary offices and the vatans annexed to them, the balance of authority inclines in favour of the alienability in permanence as well of the offices as of the vatans appendant to them, together or separately, but that "in the case of some, although not of all, such offices, the assent of the Native Government seems to have been necessary to the validity of the alienation and also if the vatan were undivided the assent of the co-parceners, if any." Chief Justice Sargent in 1885, in the case of Radhabai *v.* Anantrau Deshpande (1), after quoting the opinion of Westropp J. says "A re-examination of those authorities has led me to the same conclusion, which, if correct, can leave no doubt—although, as Westropp, C. J. says at p. 15, it might well have been expected to be otherwise having regard to the purpose for which they were granted, that the actual incumbent of a service Vatan previous to English legislation was regarded as fully representing the Vatan. As one of the Court who decided the case in Kuria *v.* Gururav (2), I may state that this important conclusion was not brought to our notice, or present to our minds.

(1) 9 K. R. 9 Bom. 198.
(2) 9 Bom. H. C. 282.

Passing to English legislation on the subject, which commences with Regulation XVI. of 1827, we find section 20 of that Regulation declaring that "the allowance derived by an hereditary officer shall in future be considered strictly as official remuneration of the person filling the office," and forbidding its alienation by any sole incumbent of the hereditary office, or by any co-sharer of such office, out of the family, a prohibition which was restricted by the interpretations put on the section by the Sadar Adalat on 22nd February 1831 and 5th December 1834, to an alienation exceeding the life-time of the incumbent or co-sharer.

The next Act (Act XI. of 1843) regulates the service of hereditary officers in this Presidency, and provides for the assignment, by the Collector, of a portion of the rents and profits of the Vatan for the maintenance of the officiating hereditary officer leaving the surplus to be participated in by the other sharers in the Vatan. After some diversity of opinion in the Sadar Adalat, it was held that Section 20 of Regulation XVI. of 1827 was not affected by this Act, and that no part of the Vatan whether assigned by the Collector or constituting the surplus participated in by the co-sharers, could be alienated. This Act, as well as Section 20 of Regulation XVI. of 1827, was repealed by the Bombay Hereditary Offices Act (III of 1874). But by sections

5 and 7 of that Act the alienation of any Vatan, or part thereof, is forbidden, without the sanction of Government, to any person not a Vatandar of the same Vatan and also of the Vatan property assigned by the Collector under Section 23 of the Act as remuneration of the officiating Vatandar to any person without such sanction, and, lastly, by Sections 10 and 11 power is given to the Collector to set aside any sale or transfer thereof and to declare the same to be null and void, and to summarily resume posses sion."

One of the questions referred to the Full Bench in the above case was, whether lands become alienable when the services are abolished. The law on the subject is thus summarised by West J. in the following words :—

"I am of opinion that the third question proposed to the Full Bench does not admit of a single invariable answer. So long as lands are assigned by the Sovereign to the support of a public office, or the land tax payable on lands is remitted in consideration of services to be performed by a particular family or line of holders, the lands are, according to the principles of the Hindu Law and the customary law of the country, incapable of an alienation or disposal, such as to divert them, or the proceeds of them, from the intended purpose—Ravlojiraw *v.* Balvantrao Venkatesh.(1) This principle has been recognized

(1) 5 Bom. 437.

in many decisions(1) Mussamat Kustoora Komaree *v.* Monohur Deo. (2) It often coincides in its operation with another principle, *viz.*, the compulsory force of a special family custom of inheritance, which prevents alienation of the patrimony beyond the family. (3) Thakur Ishri Singh *v.* Thakur Buldeo Singh (4) and in some cases even its partition within the family(5) while it replaces the ordinary rule of the joint inheritance of a group of sons by that of primogeniture or some other mode of singular succession.(6) When an estate is freed from its connection with a public office, the reason arising from that connection for the preservation of the estate intact and unincumbered necessarily fails. There is not in the lands themselves, according to Hindu law, any inheritance quality limiting them to special kinds of ownership and devolution.(7) They become subject to the ordinary laws of descent and disposal, just as where a particular custom concerning them has been abandoned (8); or they have passed into a family not subject to the custom—Shewlal Dhurmchand *v.* Bhaichand Luckhoobai (9);

(1) West and Buhler H. L. 3rd Edition, 741, 742, 846.
(2) Cal. W. R. for 1864, p. 39.
(3) West and Buhler, H. L. 159, 184.
(4) 10 Cal. 807.
(5) West and Buhler, 743.
(6) West and Buhler, 68, 156, 158.
(7) West and Buhler, 744.
(8) I bid, 3, 4.
(9) See 7 Harr. 7 D. A. Rei. 195.

Abraham *v.* Abraham (1); Soorendra Nath Ray *v.* Mussamat Hera Monee Burmoneah.(2)

But though the political and public tie, which kept a Vatan estate together, may thus have failed, a concurrent family custom producing an effect wholly or partly the same, may continue and may singly bind the hands of the successive holders of the property as strictly as before. (3) The abolition of the public duty does not in this sense, any more than the remission or the imposition of the land tax, alter the nature of the estate; Keval Kuber *v.* The Talukdari Settlement Officer (4); Raja Leelanund Singh Bahadur *v.* Thakur Manoranjan Singh.(5) It is only necessary to bear in mind that in this estate the proprietory relation of a family to certain lands is not by Hindu law a quality of the lands; it is a jural character of the family (6): Rani Padmovati and Babu Doolar Singh (7); Rani Srimuty Dibeah *v.* Rany Koond Luta (8); and Chundra Sheekhur Ray *v.* Nobin Soonder Roy. (9) If the family custom forbids alienation beyond the life of the alienor the custom will operate equally after the patrimony has ceased to be a Vatan in the technical sense as before. (10) That such a custom exists, or does not exist, may, in most cases, be gathered with reasonable

(1) 9 Moore 242.
(2) 12 Moore 9.
(3) West and Buhler, H. L. 2, 744.
(4) Bom. 586.
(5) L. R. I. A. Sub. 18.
(6) West and Buhler, H. L. 744.
(7) 4 Moore 259.
(8) 4 Moore 292.
(9) W R. 197.
(10) West and Bubler, 173.

certainty from the previous practice of the family. If, while the Vatan has been reserved for the office-holding member, the rest of the family estate has been sold or mortgaged or divided or dealt with as an ordinary joint property, that is an indication that no special custom has prevailed; that the Vatan has been kept together, not by the family law, but by the official obligation. In some cases the Vatan estate itself has been distributed within the family or group of vatandars after the fashion of an ordinary divisible property (1), though kept from leaving the family by the expressed or understood terms of the official tenure. (2) When the office ceases, the tenure ceases too, though not by the office becoming a sinecure. The Government of Bombay *v.* Desai Kallianrai Hakoomutrai (3), and there being no special family custom, the property may be dealt with in the usual way—Adrishappa *v.* Gurushidappa (4); Desai Maneklal Amratlal *v.* Desai Shiwlal Bhogilal (5).

It seems that this result is contemplated by the Bombay Acts II and VII of 1863. The former is the one that applies to the southern districts of the Bombay Presidency, whence the present case comes. Section I of the Act enables the Governor in Council to make a summary settlement with the holders of land

(1) See Act XI of 1843, see 13.
(2) West and Buhler, 173.
(3) 14 Moore 551, 558.
(4) 7 I. A. 162.
(5) 8 Bom. 426.

who claim exemption from the land tax; but clause 2 of the section excepts from the rule "lands held for service." By section 16 the Governor in Council may determine what are and are not "lands held for service," and where he has once made a settlement under the Act, he has conclusively elected to treat the estate embraced in such settlement as land not "held for service," since such a tenure would make the settlement impossible. (1) Accordingly section 2 provides that such "lands shall * * be the heritable and transferable property of the * * holders, their heirs, and assigns, without restriction as to adoption, collateral succession, or transfer." It is plain that such language must have been used with the intention of wholly freeing settled lands from official obligation. The terms on which the proposed benefits are to be secured are an annual payment of one-fourth of the land-tax previously remitted, $+\frac{1}{61}$th of the full land-tax. On such terms the estate, with which we have now to do, has been settled. It is no longer affected with a liability on account of service; and unless as a family estate, subject to a special family custom (Soorendra Nath Roy *v.* Musst. Heeramonee Burmoneah) (2); Bhan Nanaji Utpat *v.* Sundrabai (3) it has become in all respects, except its partial exoneration from

(1) See the Rules under Bom. Act II of 1863 and Act III of 1874.
(2) 2 Moore 91. (3) 11 Bom. H. C. 249, 269.

land-tax, like the ordinary landed property of the district.

There is a question which may be regarded as a particular form of the third one submitted to us, and which seems to arise in this case. It is this, where service lands, or what were deemed service lands, have been aliened, and at a later period the service has been disclaimed or abolished, does this latter event render indisputable by the alienor's heirs the title of the alienee in possession which, had the liability to service continued, might have been disputed. Assuming that there is no special family custom operating apart from the law, which preserves service lands for the intended uses, it seems that the answer to the question thus proposed, must be in the affirmative, with an addition of the terms on which family property can usually be aliened. The service lands are a property, not merely a remuneration ; otherwise the right to them would cease, with a discontinuance of the service— Forbes *v.*. Meer Mohamed Tuquee, 13 Moo., I. A. 464 ; Rajah Leelanund Singh Bahadur *v.* Thakoor Mununjan Singh, L. R. Ind. ap. sup. Vol. 182. James Joseph Sparrow *v.* Tanaji Rao Rajah Sirke, 2 Bott., R. 501. Comp. Co. Lit, 42, 204. As a property they would, subject to known restrictions, be bound by the transactions of the owner for the time being ; Trimbak Balkrisna *v.* Narayanrao Damodar Dabhalkar ;

(printed judgments for 1884, p. 120.) The change in the character of a holding on the death of a particular tenant from tax free inam to taxable rayatwari did not, it was ruled in Vishnu Trimbak *v.* Tatia, 1 Bom. H. C. Rep. 22 and Rajkishen Singh *v.* Ramroy Surma Mozoomdar, I. L. R., 1 Cal. 186, destroy the original estate or free the lands from specific liens created by the last inamdar. Here there has been an imposition, not of the full land tax, but of $\frac{3}{16}$ths of it. This would not destroy the previous estate, nor would it annul a prior alienation. The nullity of the alienation, if it is null, must arise from a character possessed by the estate at the time of the attempt to alien. On a literal construction of the regulation, the estate held by the Vàtandar would be inalienable. It is conceded, however, that it was not absolutely inalienable; the Vatandar's conveyance was valid, at least for his own life: Krishnarav Ganesh *v.* Rangrav (1) and Ravlojirav *v.* Bulvantrav Venkatesh. (2) Thus the prohibition against alienation has been allowed to deprive a vatan of the usual incidents of an estate only so far as was necessary to prevent its permanent severance from the services annexed to it, (3) Zemindar of Sivagiri *v.* Alwar Ayyangar, (4) Muttayan Chetti *v.* Sivagiri Ze-

(1) See 4 Bom. A. C. Rep. I. A. C. J.
(2) I. L. R. 5 Bom. 437.
(3) See West &c. Buhler H. L. 162, 163.
(4) I. L. R. 3 Mad. 42.

mindar, (1) Raja Nilmoni Singh *v.* Bokranath Singh, (2) Muttyan Chettiar *v.* Sangilivira Pandia Chimnatambier. (3) The nature of the estate, as such, was not otherwise varied from the common type.

In the case of the Abergavenny estates(4), where there was special statutory prohibition against alienation, it was still said. "It cannot be contended that, in consequence of the limitation imposed upon them, the successive holders of the estate are not to be regarded as tenants-in-tail at all. The limitation of the estate * * necessary makes each succeeding holder of the estate a tenant-in-tail, and what follows comes as a proviso upon the Statute.(5) So here the Hindu law makes each succeeding holder take as an heir to his predecessor, notwithstanding the collateral contingent operation of the rule for preserving the vatan from dissipation (6) Timangovda *v.* Rangaugavala(7). In the case of an alienation by the vatandar in possession, the successors reclaiming after his death would do so by virtue of the special right conferred on them incidentally to their obligation to perform the service ; and the incident would cease along with

(1) I.R.L. 3 Mad. 370.
(2) L. R. 9 I. A. 104.
(3) Ibid 144.
(4) L. R. 7 Ex. 145.
(5) L. R. 7 Ex. per Cleasby, B. at p. 153.
(6) West and Buhler H. L. 184 (a).
(7) Printed Judgments for 1878, p. 240.

the obligation, Krishnarav Ganesh *v.* Rangraretal (1). As heirs they could retain only in the same circumstances as other heirs. The right of repudiating the ancestor's transactions arose through the office descending; in this sense, it was that the alienation was void against the heirs, Ravlojirav *v.* Balvantrav Venkatesh (2). If legally possible, it was but voidable, and the special burden on the lands having made the alienation not originally null, but only subject to defeasance for the benefit of the service. Adrishappa *v.* Gurushidappa (3), (4). That cause for recovery could no longer avail when the service itself had once been finally dispensed with."

Vatans in Bombay are inalienable (see Bom. Act 111 of 1874 and Act 5 of 1886). A mortgage and sale in execution of it, before 1827, could have no force beyond the life of the mortgagee. (5) These Vatans were originally impartible but have now come to be regarded as partible until a custom to the contrary is proved, (6) but they may be proved to be impartible and discontinuance of services would not make an impartible estate partible. (7)

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(1) See 4 Bom. H. C. Rep. at p. 15, A. C. J.
(2) I. L. R. 5 Bom. 437.
(3) See I. L. R. 4 Bom at pp. 502, 503.
(4) West and Buhler H. L. 162, 163.
(5) Ramangavda *v.* Shivapugadda, 22 Bom. 601, see 20 Bom. 423.
(6) Padapa *v.* Swami Rao, 24 Bom. 556.
(7) Adıishappa *v.* Gurushedappa, 7 I. A. 162. Gopal Hari *v.* Ram Kant, 21 Bom. 458.

In a suit for the partition of part of a Deshgat vatan brought by the younger brothers of a joint Hindu family against their eldest brother, the Desai who alleged that the vatan was impartible subject to a right by custom that younger brothers should receive maintenance out of the income, it was held by the Privy Council, that until the vatan was proved to be impartible by evidence of custom sufficient to rebut the presumption of the prevalence of the general Hindu Law, it must be considered as partible and when it was found that the office of the Desai was hereditary and the vatan appertained to it, the decree for partition must be made subject to the right of the Desai to receive any income out of it for the performance of his duties to which he might be entitled under any law in force (Adrishappa *v.* Gurushedappa, 4 Bom., 494, 7 I. A. 162).

Ordinarily Sanadigrants in *inam*, *saranjam*, *jagir*, *wazif*, *devasthnan* and *sevasthan* in the Bombay Presidency are "more properly described as alienations of the royal share in the produce of land *i. e.*, land, revenue, than grants of land though in popular parlance so called"(1). But the grant may be made in terms as to convey the proprietory right in the soil (2) *e. g.*, when the grant conveys right to "water the trees,

(1) Per Westropp, C. J., 4 Bom. H. C., A. C. J. 1.
(2) Raoji Narayun *v.* Dadaji, Bajujree, 1 Bom. 523.

the stones, the mines and the hidden treasures therein but excluding the hakdars and inamdars." Again *saranjam* as well as *jagirs* may be of a personal nature, *Zat saranjam*, or for the maintenance of troops, *fouz saranjam*. (1) Colonel Etheridge in his Preface to the list of saranjams published in 1874, makes the following observations about the character of these tenures :

"It was the practice under former governments, both Mahomedan and Mahratta, to maintain a species of feudal aristocracy for state purposes by temporary assignments of revenue, either for the support of troops, for personal service, the maintenance of official dignity, or other specific reason. Holders of such grants were entrusted at the same time with the powers requisite to enable them to collect and appropriate the revenue and to administer the general government of the tract of land which produced it. Under the Mahomedan dynasty all such holdings were known as *jagirs* and under the Mahratta rule as *saranjam*. If any original distinctive feature marked the tenure of *jagir* and *saranjam*, it ceased to exist during the Mahratta Empire : for at the period of the introduction of the British Government there was no practical difference between a jagirdar and a saranjamdar either in the Deccan or Southern

(1) Steele's Hindu Castes, p. 207.

Mahratta country. The terms *jagir* and *saranjam* are convertible terms. These holdings being of a political character were not transferable, nor necessarily hereditary, but, as a rule, were held at the pleasure of the Sovereign. On succession a nazrana was levied." Again in the Fifth Report of the Select Committee on Indian Affairs (p. 86) we find the following: "With regard to jagirs granted by Mahomedans either as marks of favour or as rewards for public service, they generally, if not always, reverted to the State on the decease of the grantee, unless continued to his heir under a new sanad; for the alienation in perpetuity of the rights of Government in the soil was inconsistent with the established policy of the Mahomedans, from which they deviated only in the case of endowments to the religious establishments and offices of public duty, and in some rare instances of grants to holy men and celebrated scholars."

On the assumption by the East India Company of the Carnatic, by an order of the Governor of Madras dated 5th of August, 1801, a list of all jagirs was prepared and other sunnads examined and all jagirs not being Altamgha were declared to be "held by tenures dependent on the pleasure of the governing power." The Privy Council in the case of East India Company *v.* Syed Ally (7 Moore 553) supported the view of the government that these grants were merely

grants of portions of public land revenue and conveyed no proprietory interest.

It has been held that a Saranjam is ordinarily impartible and descends entire to the eldest representative of the past holder but such representative is entitled only to the sole management of the tenure subject to the rights of the other members to receive their respective shares in the profits of the village and is like a trustee from whom the other members can demand an account. (1)

It has been held that a Saranjam given for the support of a distinguished family is generally in its nature impartible and inalienable apart from any connection with public service. (2)

A Dayadi Pattam in Madras is an estate belonging to a family, impartible and inalienable, in which the senior in age of the Dayadis becomes the Polygar whose position is not merely that of the manager for the family but who has no right to make a sale or a gift. (3)

Inams in the Madras Presidency are of two kinds ; one is called Bhattavirtti or "assignment of revenue or lands granted to Brahmans at low rents for their subsistence," and the other ordinary service grants. These Inams are governed by certain Inam rules, Reg. VI. of 1831 and Act 4 of

(1) Narayan Jagannath Dikhit *v.* Vasudeo Vishnu Dikshit, 15 Bom. 247.
(2) Ram Chandra Vakharam *v.* Sakharam Gopal, 2 Bom. 346.
(3) Swasabramania Naicker *v.* Krishnammal, 18 Mad. 287.

1866. The last mentioned Act authorized the enfranchisement of service Inams. The Government relinquished the condition of service attached to the Inam and the reversionary interest they had in consideration of a quit rent imposed on the Inam according to the rules framed by them. Inam rule 25 lays down that "the settlement will be made with the registered holder of the Inam who according to existing practice is alone considered responsible to the government. But this rule will not interfere with the enjoyment of subordinate shares in the Inam by other members of the family subject to such quit rent or other conditions as may be imposed on it by the new settlement, in communication with the head of the family."

In the case of Bhattavartti Inams, it was held that the mere settlement with one as the head of the family did not destroy the rights of the other members (1). In the case however, of an hereditary service Inam attached to the office of Kuttubadi or peon—every office however low had under the old system land attached to it—which it was alleged had been enjoyed by the members of a family who performed the service by turns, it was held that "the land was appurtenant to the office, and the Government determined to sever it from the

(1) C. Venkanna *v.* M. L. Narayana Sastrulu, 2 M. H. C. R. 327; A. Vissappa *v.* A. Ramayagi, 2 M. H. C. R. 34.

office and to allow the office holder for the time being to enfranchise it" "and as the appellant was never the holder of the office he could not have a claim on the emoluments." (1) It is difficult to understand the decision. If the Inam was the exclusive property of the registered holder being an impartible estate, the reason of the decision is clear. But if the Inam belonged to the family, the registered holder being a trustee in his capacity as head of the family, it does not seem clear how the rights of other members could be denied.

I shall now give you a description of a Madras Tarawad as contained in a book recently published by a learned Madras gentleman.

"The most astounding feature in the constitution of a Malabar Nair Tarawad is that the system of kinship which obtains is one in which fathers are practically ignored and descent is reckoned through mothers. The Civil Law of the land takes cognisance only of relations on the female side. The constitutions of the Tarawad or family of people living together is exceedingly complex. A mother and all her children, both male and female, all her grand-children by her daughters, all her brothers and sisters and the descendants on the sister's side, in short all the woman's relatives on the female side, however, distant their relationship, live together in the

(1) Bada *v.* Hussu Bhai, 7 Mad. 236.

same block of buildings, have a common table, enjoy all her property and share it after her death in common with one another. There are, at present, instances in the country of such Tarawads with about two hundred members belonging to different branches and separated from one another by generations of descent yet all able to trace their descent from one common ancestress. When, by the constant addition of members to a Tarawad it becomes too unwieldy to be governed and managed by one man, natural forces begin to work and bring about a division of it into various distinct Tarawads which keep up the original traditions of their common descent but have no legal right to the property of one another. These partitions are often so arranged as to bring into separate Tarawads closely related members who before belonged to one branch of the original constitution and the kindred sympathies of the members are thus placed on a better and stronger basis of relationship. Over the whole of this group of members living in one Tarawad the eldest male is by legal right appointed *Karanavan* or managing head; and on his death the next senior male member, to whatever branch of the family he may belong, succeeds to that office in preference to all others. Thus the joint property of the whole Tarawad is kept under the control and management of the *Karanavan* who is legally responsible for its

safe-keeping as well as for the education of its junior members and for all the necessities arising from its social status.

The Law by which succession is regulated in these Tarawads is called the Marumakkathayam law (succession by nephews). The name Marumakkathayam is somewhat misleading since it might suggest that the family succession is restricted to nephews alone; whereas, a brother or any other kinsman on the female side who happens to be the eldest male member at the time of the death of a *Karanavan* succeeds to the headship to the exclusion of nephews. The spirit of the law governing these Tarawads is that while the joint property belongs to the females, their natural incapacity for family government has made the eldest male member the life-trustee of the joint estate. These trustees are entitled only to maintenance out of the joint property; and must in no way alienate their trust properties without the express or tacit consent of all the members of the Tarawad; unauthorized alienation of such properties or acts of mismanagement on the part of a *Karanavan* being legally sufficient cause for his removal from managership and for the substitution in his stead of some one in whom the family have full confidence.

The general presumption in law is that these Karnavans have no private property of their

own ; anything that they might happen to possess being generally presumed to have been earned out of the incomes of the joint estates which are at the time under their management. But in case of a legal dispute if a Karanavan proves to the satisfaction of a Court of law that certain property is his own acquisition, such property is invariably declared his private earning. The junior members both male and female are allowed the free right of making acquisitions for themselves and these they are at absolute liberty to dispose of in any way they like during their life-time. But the private acquisitions of every member, male or female, who dies intestate lapse to the joint property and thus become common property of the Tarawad. But of late years there has been a tendency shown by Courts to declare such property to lapse to the nearest line in preference to the joint property.

The joint property thus held is impartible except with the unanimous consent of all the members, an expression of disagreement by any one single adult member, male or female, being fully sufficient for breaking off a partition arrangement. In partitions, the joint property, both moveable and immoveable, is divided in equal shares ; but the Karanavan for the time being has a conventional right to a double share. Should a Karanavan by reason of his distant relationship to some particular branch of the

family or through preference for his own immediate branch deprive the former of the benefits that are derivable from their legal claim to the joint property, such a branch has the privilege of suing him for maintenance and getting a decree for the same against him.

With regard to the question of succession another thing to be noticed is that in the absence of any male member to succeed to the office of Karanavan, the eldest female takes precedence of all others ; and when a Tarawad becomes extinct on the death of the last surviving member, the property is claimed by the reversioners of the Tarawad or in the absence of even such heirs escheated to Government."*

The peculiar tenure called Polliam is described in the 5th Report on the affairs of the East India Company in 1812, pp. 117, 150, 130-1. "It is a species of tenure which in olden times was held by petty chieftains for services rendered to the state, and although the Polligars acknowledged the State as paramount, yet, they were, in fact, almost independent." The Privy Council adopted the description of these tenures as given in Wilson's Glossary. They say "A Polliam is explained in Wilson's Glossary to be "A tract of country subject to a petty chieftain." In speaking of Polligars, he describes them as having been originally petty chieftains occupying usually tracts

* Malabar Law p.

of hill or forest, subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent; but as having at present, since the subjugation of the country by the East India Company subsided into peaceable landholders. "A Polliam is in the nature of a Raj. It may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the Polligar, the other members of the family being entitled to a maintenance or allowance out of the estate." (1) The ordinary incidents of impartible Rajes apply to the tenure.

Such a tenure is recognised by Madras Regulation 4 of 1831.

It has been held that females are not precluded by any rule of descent, custom or usage of Cumbala Tother caste from succeeding to a Polliam (2).

The Illuvans and Tiyans of Palaghat originally formed one class. But in course of time separate customs have come to prevail among them. It has been held that the custom of impartibility prevails among the Tiyans (3), but no such custom was proved to exist among the Illuvans. (4)

(1) Nargunty Lutchmeedasamah *v.* Vinguma Naidoo 9 Moore 86.
(2) The Collector of Madura *v.* Veeracamoo 9 Moore 446.
(3) Raman Menon *v.* Chathunni, 17 Mad. 184.
(4) Velu *v.* Chammu, 22 Mad. 297.

I have already described the impartible estates of Orissa and the legislation concerning them. They are divided into two classes the Gurhjat and the Killajat Rajas. "Their customs are recorded in what is called the Pachees Sawal which is a record embodying the answers given by the chiefs of the sixteen Tributary Mehals in the Zillah Cuttack and of certain Killas in the province of Orissa to questions put by the Superintendent in 1814. After that statement had been drawn up, Regulation XI. of 1816 was enacted, which provided that the estates of those sixteen Tributary Mehals should descend entire to the person having the more substantial claim according to local and family usage." (1) The Gurhjat are in the Non-Regulation Mehals and the Killahjat are in the Regulation Mehals. Their customs are slightly at variance with each other. The Pucchees Sawal will be given to you at length in the lecture on inheritance. It should, however, be stated here that it has been invariably acted on since 1823. (2)

We next go to Ghatwallies. The following account is given of their origin in a judgment of the Privy Council: "In Mr. Grant's Analysis

(1) Nittanund Murdiraj *v.* Sreekurun Juggernath, 3 W. R. 116.

(2) Raja Sham Soondur Mohendar *v.* Kishen Chunder Bewarlah Rai, 4 Select Report 39. Raja Jenarden Ummur *v.* Okhoy Sing, 1835, 6 Select Report, p. 42. (Dhekannal). Bunkey case, 6 Select Report, p. 296, Parikood case, Hurrishpore case. Prandhur Roy *v.* Ram Chunder Magraj, 1 Sudder Report 1861, p. 16. Attgarh case. Nittanund Murdiraj. *v.* Sreekurun Juggernath.

of the Finances of Bengal addressed to the Court of Director in the year 1876 and printed in the Appendix to the Fifth Report of the Select Committee on the Affairs of the East India Company, p. 268, the Zemindary of Beerbhoom is stated to have been conferred by Jaffar Khan, an Afghan of Pathan tribe, "for the political purpose of guarding the frontiers on the West against the incursions of the barbarous Hindus of Jarkhand by means of a warlike Mahomedan peasantry entertained as a standing militia with suitable territorial allotments under a principal landholder;" and Mr. Grants afterwards describes the tenure "as in some respects corresponding with the ancient military fiefs of Europe, inasmuch as certain lands were held Lakheraj or exempt from the payment of rent, and to be applied solely to the maintenance of troops." There is no doubt that the tenures here spoken of are Ghatwally tenures though they are not mentioned by that name. Beerbhoom immediately adjoins Khurrackpore and in 1795 some Ghatwally lands were transferred from Beerbhoom to the District of Bhagulpore in which Khurrackpore is situate.

"In 1813, a report was made by the Collector of Bhagulpore to the Magistrate of Beerbhoom, in answer to certain inquiries with respect to Ghatwally lands in his District. The Collector states that the Ghatwally lands in his District

are of four kinds: First. The lands already referred to are granted by Mr. Cleveland (who had granted some new Lakheraj Ghatwallies, in 1781 on a rent of 2 as per bigha). These he states to have been allotted to the owners of the forests, at the foot of certain mountains, which he names in various Pergunnas and amongst others "Pergunnah Kankgoles, and in some other villages of the Kharruckpore estates to certain Ghatwals and watchmen in lieu of salaries in the proportion of the number of watchmen, attending the said Ghatwals, to attend to and guard the watch stations at the passes, and to patrol the precincts of the villages that no mountaineers might be able to descend from those passes of the mountains to concert night attacks, to invade or assault or to plunder money or cattle or to create disturbance." The second class, the report describes as, "The Ghatwals attached to the Khurrackpore estate who pay a stipulated rate of rent for their lands and villages, being bound to protect and guard the highways, to watch the stations at the passes, to prevent disturbances being created by the mountaineers, thieves and highwaymen. They hold their lands granted by the Zemindar of Kharruckpore, except some who have received theirs from the former authorities."

"The report then proceeds to state: "That when the Zemindar or Government authority

wishes to appoint a Ghatwal to guard the frontiers of the villages, it is his duty to ascertain the produce of villages, the quantity of Ghatwally lands therein and after deducting a certain rate in the rates of the guards with the Ghatwals in lieu of wages to fix a certain rent to be paid by the Ghatwals." After mentioning other descriptions of Ghatwally lands he states his opinion, that the Ghatwals have no right of inheritance or proprietory interest in their lands but hold right of possession as long as they perform the terms and conditions of their sunnuds. The report then states that at the time of the Decennial Settlement the Ghatwals were not treated as independent Talookdars ; that no settlement was made with them, but that they were included in the settlement of the Zemindar of whom their lands were held. In 1816, another report was made by the Collector of Bhagulpore in which it is stated, that the Ghatwals pay a fixed rent to the Zemindar of Khurruckpore and continue under his control, direction and subjection, while the Raja is answerable to the collector for the rents of the entire District of Khurruckpore."

"Regulation 29 of 1814 declared that "the lands held by the class of persons denominated Ghatwals, in the district of Beerbhoom form a peculiar tenure to which the provisions of the existing regulations are not expressly applicable"

and "every ground exists to believe that according to the former usages and constitutions of the country, this class of persons are entitled to hold their lands generation after generation, in perpetuity subject to the payment of a fixed and established rent to the Zemindar of Beerbhoom and to the performance of certain duties for the maintenance of the public peace and support of the Police." It was enacted that they had to pay the rent which was assessed on them, direct to the Government, the latter undertaking to pay "the difference between the amount of the revenue assessed on the Ghatwals and the fixed assessment of revenue of that portion of the Zemindary of Beerbhoom payable to the Government, to the Zemindar of Beerbhoom." Thus the Ghatwals of Beerbhoom were given a position quite independent of the Zemindar which they did not possess before.

This description is confined in terms to the District of Beerbhoom, but in the case of Hurlall *v.* Jorawun Sing (6. Sel. Rep. 170) which occurred in 1837, a question arose as to the nature of these tenures generally, the point for decision being, whether they were divisible on the death of a Ghatwal or descended to his eldest son. One of the Judges states that those tenures are very common in the Nerbadda territory for the protection of the ghats. Another of the Judges seems to consider them as Chakeran lands;

and the Court was of opinion, that the lands being held conditionally for the performance of certain defined duties, they were not divisible on the death of the Ghatwal but descended to the eldest son. "Lands of this description could as properly be considered as lands of which the Zemindars had been permitted by the Government to appropriate the produce to the maintenance of Tannah or Police establishments. They were held by a tenure created long before the East India Company acquired any dominion over the country, and though the nature and extent of the right of the Ghatwals in the Ghatwally villages may be doubtful, and probably differed in different Districts and in different families, there clearly was some ancient law by which these lands were appropriated to succeed the services of Ghatwals ; services which although they would include the performance of duties of police were quite as much in their origin of a military as a civil character and would require the appointment of a very different class of persons from ordinary police officers. We find accordingly that the office of Ghatwal in this Zemindary was frequently held by persons of high rank before the date of the Regulations.

Before the date of the Regulations and in 1783 we have a letter from the Collector of Bhagulpore to the Raja Kader Ali informing him

that the Ranee Surbissuree (who from the title must have been a female of high rank) had been dismissed from her office of Ghatwal of Juaimee Humapa, which is situate in the Khurruckpore estates by order of the Governor-General in Council and intimating that, "as the office is in your Highness's gift your Highness will, should you deem it necessary and proper, appoint a person to the office of Ghatwal of the said Pergunah to watch day and night at the said Ghat." Surely the language here used in speaking of the Ghatwal is little suited to the appointment of a police officer. It is rather that which in ancient times in England might have been addressed to a Lord of the Marches with respect to a chieftain under his orders.

"We have a letter from the Collector of Bhagulpore to the Raja of Khurruckpore on the 18th of September 1808, in which he observes, "As the settlement of rent between the watchmen and yourself rests with you, as also does the dismissal and transfer of Ghatwals and as is usual and customary on your estate, the Magistrate has no objection to the measure (which the Raja had proposed to take) nor is the Collector opposed to the step": and in the reports of the Collectors to which we have already referred, it is stated, that it is the province of the Raja to appoint and dismiss the Ghatwals attached to the Khurrackpore estates, and that he usually but

not always makes a report to the Government when he does so, and "that the settlement rests with him and he raises or depresses the rent."

"Some years before the year 1855, the Government of Bengal claimed a right to resume or reassess lands of considerable extent and value within the Zemindary of Khurruckpore in the possession of various Ghawals, who held them by Ghatwally tenure under the Zemindar. The claim was enforced by the Government, though opposed on the part of the Zemindar, and for some time at least on the part of some, if not all, of the Ghatwals. There was a great and complicated mass of litigation upon the subject before various tribunals, with various success, sometimes one party gaining a decision, sometimes another. The suits were numerous. At last the Zemindar brought one of them by appeal before Her Majesty in Council and upon that appeal in 1885, the Judicial Committee decided against the Bengal Government on grounds fatal in principle to its entire claim of resumption and reassessment as to all Ghatwally land." (Raja Leelanund Sing *v.* The Government of Bengal, 6 Moore 105.)

The Ghatwallis of Beerbhoom described above are all hereditary and impartible. Ghatwallis may be held under Sanads conveying as hereditary indefeasible right or on payment of a quit rent with enjoyment of profits in lieu of wages

for services. In the latter case, when the holder has ceased to perform the services, the tenure may be resumed. But even in the latter case, when the tenure has been held from before the Decennial Settlement the omission of the words of inheritance does not show that it is not hereditary and must be presumed to be hereditary when it has descended from father to son for many generations. Such tenures are dependent talooks under Reg. 8 of 1793. These tenures and like jaghirs in the Pachet Zemindary are not alienable or liable to sale in execution against the holder for the time being and the tenure-holder cannot sell or grant permanent leases except bonafide jungleblooree leases.(1) A Ghatwali tenure in Kharagpore is transferable if the Zemindar assents. (2) It has been held in a recent case that after deduction of all necessary outgoings from the total rents due to a Ghatwal the residue being his personal property may be attached in execution of a decree against him (3).

(1) Nilmoney Sing, *v.* Burko Nath, 9 Cal. 190 P. C.; Grant *v.* Bansideo 15 W. R. 38, Davies *v.* Debee 18 W. R. 376.
(2) Kaliprosad *v.* Anand Koy, 15 Cal. 471 P. C.
(3) Rajkishwar *v.* Bungshedhur, 23 Cal. 873.

LECTURE IV.

Impartible Zemindaries and Tenures—Succession.

Several theories have been propounded by learned scholars about the origin of kingship and about its devolution in early times. Very learned men have however, a predilection for magnifying facts discovered by them by laborious study as the root of all possible institutions. The theory of village communities of Sir Henry Maine and the recent theory of Dr. Frazer about early kings being magicians who owed their office to magic are instances in point. Sir Henry Maine also, was of opinion that the early king was also the priest. It is not safe to rely on one isolated fact in the history of one race and speculate and evolve theories and find justification for them by existing facts collected with great labour from the institutions of the savage races of Polynesia and Africa. Dr. Frazer has supposed that the King of the Wood at Nemi was the origin of the Roman king and that his magical instruments were the origin of the regalia of a king.* He has

* Lectures on the early history of Kingship by I. G. Frazer D.C.L. (1905) p. 9.

supported his theory from contemporary customs of Polynesia and Africa. These great scholars, Sir Henry Maine and Dr. Frazer on account of their ignorance of Sanskrit and the ancient literature of Asia, took all their theories from studies in Roman and Greek literature and the accounts of modern travellers. So far as the Aryan races are concerned we have authentic history of their customs recorded in the Vedas which take us back at least to 3000 years before Christ. There is not much room for speculation. Thanks to the patient scholarship of Max Muller and other European scholars, who did not occupy high official positions like Sir Henry Maine and were not in consequence prevented from wading through Vedic and Avestic literature, we know with tolerable certainty the history of a great many of the institutions among Aryan nations. That magic was much in vogue among the ancient Aryan races is clear from the Atharva Veda. The Atharvan or the powerful magician priest was never the king. Angiras and Vasista were priests and protectors of kings. We have no indication that the king was ever a priest or a magician. One thing is certain that before the Aryans parted company with each other, before the

* The village community of Sir Henry Maine which is a self-sufficing community with its priest, accountant, barber, washerman &c., each having rights in the land did never exist in India and does not exist in India. A village belonging to a family having their own barbers, washermen, carpenters &c., settled by them on the land was of common occurrence. A village belonging to Brahmans and Sudras in common in the above manner is an absurdity.

Persians went to Persia and the Indian Aryans crossed the Himalayas, the king could never belong to the priestly caste. If the Vedic King Pururaba had the nymph Urvasi for his mistress or the Roman King Numa had Egeria for his mistress and dabbled in religious practices that does not prove that the King was a magician or a priest. The theory that the kingly office was impartible, because it was the office of a magician or a priest, is too grotesque to require refutation. The office was considered sacred but that is no reason, that it had its origin in priesticraft or magic. The earliest record of human institutions mentions of the consecration of the king. It was supposed that on this consecration, the gods endowed the king partly with their powers. Surprising as it may appear, with the exception of Manu who is supposed to be a son of the Sun, there is no mention of a king of divine pedigree in the Rig Veda. The greatest kings mentioned there, such as Sudasha, are of non-Aryan and slave origin. It is only in the Puranas that we find pedigrees of the kingly houses traced with great definiteness from the Sun or the Moon or latterly, on the extinction of the Solar or the Lunar lines, to Agni. Homer's chief kings are Jove-descended and his chief heroes god or goddess-born. Homer's period is later than the Puranic period in India. Priests and bards had

then invented pedigrees for their kings and heroes. The deification of mortal man is not an ancient custom. It is the outcome of the servility of priests and bards and of the exaggerated flattery of courtiers in luxurious times, when kings surrounded themselves with extraordinary pomp and circumstance. Those terms of exaggerated flattery are considered even in the twentieth century as proper official language. There is one circumstance which has been mentioned in connection with the office of the king as showing his character of magic healer. The touch of the King of England cures scrofula. Some kings of Polynesia can bring down rain. I am not concerned with the Kings of Africa or of the head hunters of the Pacific islands. But the alleged healing power of a European king is a curious circumstance. There is no indication anywhere that such power was ascribed to any other king of Aryan origin, Hindu or Persian, Greek or Roman. Probably the English king owes his power to his being the descendant of Edward the Confessor, who became a saint of the Roman church. In India we have however, a strange belief that the king is responsible for the welfare of his subjects. Famine and plague, want of rain and inundation are all ascribed to the unjust character of the reign of a king. Rama was accused by a Brahman of unrighteousness of his reign, because

the latter had lost a son by untimely death. This idea also had its origin in the prevailing belief of the extraordinary good fortune (the Aryan nations all believed in good and bad fortune) of the King, and this extraordinary virtue was supposed to proceed from him on account of his consecration and the sacrifices which he performed. Then again, the stories of extraordinarily just kings, like Rama, and the prosperity of their reigns were instrumental in creating the expectation in the popular mind of having like prosperity under every king and ascribing all misfortunes to the unrighteousness of the king. But whence comes the Puranic belief of having only two lines of kings —the Solar and the Lunar? Probably before all the gods came into existence, the Sun as the ruler of the day and the Moon as the ruler of the night were worshipped and as kings in their might were supposed by their courtiers as resembling the Sun and the Moon, they were said to be their descendants. This myth of Sun-descended kings was also found among the West Indians who had no connection with the Aryan races and had none of their customs. However that may be, there is no indication in the Vedas of the myth of kings being descendants of the gods. For that we must go to the more cultured times when poets, priests and courtiers flourished in India, as well as in Greece and Rome.

The evolution of the office of the king has

been described in my introductory lecture. I have not indulged in any speculation except the speculation from the common words of the Aryan races, which contain in them the most authentic history. The facts on which my conclusions are based are facts of history of which there is no doubt. I have thought it necessary to refute certain theories of learned men about kingship and impartibility of kingdoms because they go against incontrovertible facts and because if correct, they would show that the principles of succession to impartible property, according to the Smṛtis and the Puranas, are without any foundation in history. I also consider it waste of time to discuss the theories of these scholars about succession on the female side in preference to the male, in ancient times, as there is absolutely no room for them in the institutions of the Aryan races, as I have shown in my book on the Principles of Hindu Law.

We have already seen how the office of the king was evolved among the nomadic Aryan tribes. It is true, as Tacitus says of the Germans, that the familæ and the propinquitates fought together in battle under their own leaders and it is also true, as Schrader says, that during their migrations there was a leader of the tribes. A flood of light is thrown on the matter by the history of the Rajputs Owing to the labours of that great scholar and lover of India, Colonel

Tod, we know with tolerable accuracy the history of the rise and growth of the modern Rajput States. It appears that in every case the State was formed by the male children of one man. The numerous progeny of Bappa formed the Rajputs of Mewar. The sons of every Raja had large fiefs granted to them on condition of military service and they in their turn became chiefs and parcelled out their grants among their sons, who were called after them, such as Saktawats The eldest became the Raja in the case of the Raj and the Sirdar in the case of the fief. Unlike the feudal lords of Europe, the Sirdars of a Rajput kingdom almost all belonged to one family, that is, of the king. The kingdom of Mewar is thus the kingdom of the Sesodias. The kingdom of Jodhpore is the kingdom of the sons of Jodha the founder, who were so numerous that one hundred thousand of them were always at the disposal of their chief. This is the pure Aryan system. We can now understand how the ancient Panchalas, the Kashis, the Ikshakus, the Kurus and the Yadus were formed. We now see how Kshatriyas or Rajanyas were synonymous terms. They were all princes who fought the aboriginal tribes and kept them in subjection. It is said that the Rajputs were Aryans but late arrivals in India, being of Scythian origin. If that is so, the customs of the Rajputs show the original customs of all Aryan

nations and of those tribes that first came to India. In the very nature of their constitution, the rule of male succession and that of primogeniture governed the early Aryan invaders, as they do the present Rajput chiefs. This explains the rule of the eldest succeeding and the inalienability of land outside the family, which we find prescribed by the most ancient law-givers. In course of time, when the non-fighting castes of Brahmans and Vaisyas were evolved and when great subdivision of land made the Kshatriyas small allodial proprietors, such as are still found among the more ancient Rajputs settlers of the Rajput States, the rule of primogeniture fell into disuse and equal division became the law of the Hindus, except in the case of principalities, feudal tenures and offices of State.

But it must not be supposed that impartibility was an original incident of kingdoms. The headship of the tribe or clan ordinarily went to the eldest son, but it sometimes went to a worthier younger son, as Narada says, and as we find mentioned in the Ramayana, showing that at some remote time the office went by election. But as to the land, we find mentioned in the Puranas, that kings very often divided their kingdoms among their sons. We have seen how in Europe impartibility became the rule only in the 11th century. It is only when the idea of the divine right of kings got firm hold of the

mind of the people that impartibility became the rule. The anointment of Saul by Samuel was the origin of the idea of the divine character of the office of the king among Jews. With the introduction of Christianity the anointment of kings was introduced by the priests, who got their idea from the Hebrew scriptures. In India, it appears that the idea was introduced by the priests first in the case of a great conquering emperor who ruled from sea to sea. He was considered too great to be a mere man. He was supposed to be formed of the essence of the Gods. As symbolical of his power he was bathed in the waters of the seven seas and of all the great rivers of India, and the conquered kings had to pay homage on the occasion. The ceremony, which was regarded as a religious one and was accompanied with great pomp and circumstance, was called Abhisekha. This ceremony which was only appropriate to a world-emperor came to be performed by all minor kings in imitation of them. The emperors were great gods and these became little gods. We do not find in the Rig Veda any indication of the divine right of kings. But in the Yajur Veda, the idea is inculcated. This is one proof of the great distance of time between the compositions of these two principal Vedas. The Yajur Veda was composed at a time when there were great Chakravarti kings with numerous dependent

kings in India. Now, when the idea of the divine character of the king's office was firmly established, the theories, which we find enunciated in the Mimansa, came into existence, namely, that the king had no right in the soil and that kingdoms were inalienable. The practice of dividing kingdoms among sons fell into disuse. But the right of younger sons to receive a portion of the kingdom in fief was acknowledged and this custom, the operation of which can be traced in the existing Rajput States, is the foundation of the system by which a prince could command a hundred thousand horsemen, "all sons of the same father," all sons of kings, all Rajanyas. We find in the Ramayana, Janaka recognising the obligation of establishing a younger brother in a kingdom. Rama established all his younger brothers in separate kingdoms but all these are mentioned to be newly conquered kingdoms. With all the idea of the sacred character of the king and the impartibility of kingdoms, we find however, Rama, the greatest examplar of all Indian emperors, dividing his ancestral kingdom of Kosala between his two sons, Lava and Kusa, which from that time became divided into Northern and Southern Kosalas.

The Smritis speak of the rules of inheritance. According to them, all property with certain specified exceptions is governed by the rule of equal division among sons. King-

doms are governed by well established Kulachara, as is mentioned in the Ramayana.* Nevertheless the disqualifications which exclude from inheritance, according to the Smritis, have always been considered applicable to Rajes. The great war of Bharata was the outcome of the application of the rule that a blind elder brother should not succeed to a kingdom. Duryodhana, the son of the blind Dhritarastra contested the justice of the rule and considered himself qualified to

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* इक्ष्वाकूणां हि सर्व्वेषां राजा भवति पूर्व्वजः ।
* * *
स राघवाणां कुलधर्म्ममात्मनः ।
सनातनं नाद्य विहन्तुमर्हसि ।

Among all Ikshakus the eldest becomes the king. Do not this day destroy the family *dharma* (custom) of the Raghavas and of yourself.

Ramayana, Ayodhya Kanda, 110 Ch. 37.

† पित्रतः प्राप्तवान् राज्यं पाण्डुरात्मगुणैः पुरा ।
त्वमन्धगुणसंयोगात् प्राप्तं राज्यं न लब्धवान् ॥
स एष पाण्डोर्दायाद्यं यदि प्राप्नोति पार्थिवः ।
तस्य पुत्रोध्रुवं प्राप्तस्तस्यापि चापरः ॥
ते वयं राजवंशेन हीनाः सह सुतैरपि ।
अवज्ञाता भविष्यामो लोकस्य जगतीपते ।
सततं निरयं प्राप्ता परपिण्डोपजीविनः ॥
यदि त्वं पुरा राजन्निदं राज्यमवाप्तवान ।
ध्रुवं प्राप्स्याम च वयं राज्यमप्यवशे जने ॥

Pandu obtained the kingdom descending from his father through his own virtues. You (Dhritarashtra) did not get the kingdom which had descended to you, because of the disqualification of blindness · If Pandu's son now obtains the kingdom as Pandu's inheritance, his son, son's son and other descendants will also certainly get it. O, king of the world ! ourselves with our children excluded from the royal line shall certainly be disregarded of all men. Therefore adopt such policy that we may not, being dependents for our food on others, be distressed as if in hell. If the kingdom descended to you before, certainly we shall get it, though the people may be against us.

Mahabharata, Adi Parva, 143 Ch. 34-38.

succeed to the headship of the Kurus.† His claim was admitted by a very large number of Kshatriyas and Brahmanas and were it not for the superior statesmanship of Krishna and the superhuman prowess of Arjuna, the rule of the exclusion of the blind and his sons would have been washed away in the deluge of blood which flooded the field of Kurukshetra. The Kula-chara of the Rajput States has laid down, says Colonel Tod, that not only the blind but also the on-eyed should be excluded from a Raj. There is however, no justification in Hindu Law for this rule.

We do not know whether the son of a pre-deceased eldest son succeeds. We have no such instance either in the Haribansa, or the Bhaga-bata or the Raj Tarangini. But Colonel Tod gives instances in which the son of the pre-deceased eldest son succeeded in preference to sons.

The rules governing kings and kingdoms are supposed to be found in the Nitishastras. They were supposed to be very volumnious books, especially those by Vrishaspati and Sukra. But unfortunately we know them only by name from the Mahabharata* and other books. We have only got a book on Niti by Kamandaki, written about the time of Chandra Gupta, by a disciple of

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* बृहस्पतिर्हि भगवान् नान्यं धर्म्मं प्रशंसति ।
विशालाक्षश्च भगवात् काव्यश्चैव महातपाः ।
सहस्राक्षो महेन्द्रश्च तथा प्राचेतसो मनुः ।

Chanakya, or Vishnu Gupta, the Machiævel of India, who himself also had written a book on Niti,* and another small book supposed to be based on Sukra's great book, called Sukra Niti.

We get the following rules laid down in the Puranas and the Niti Shastras.

1. The eldest son alone takes a Raj. (1)
2. A blind son does not succeed. (2)
3. A Patita or outcaste son does not succeed. (3)

भारद्वाजस्तुभगवान् तथा गौरशिरा मुनिः।
राजशास्त्रप्रणेतारो ब्रह्मण्या ब्रह्मवादिनः।

Vrihaspati does not praise any other Dharma (except the Dharma of kings), Visalaksha, Sukra, the thousand-eyed Indra, the Pracheta, Manu, Bharadwaja and Gourashira, these possessing Brahmajnana have written books on Rajshastra or the law about kingdoms.

Mahabharata, Santi Parva, Ch. 58, v. 13.

* ब्रह्माऽध्यायसहस्राणां शतं चक्रे स्वबुद्धिजम्।
तन्नारदेन शक्रेण गुरुणा भार्गवेण च॥
भारद्वाजविशालाक्षभीष्मपाराशरैस्तथा।
संक्षिप्तं मनुना चैव तथा चान्यैर्महर्षिभिः॥
प्रजानामायुषो ह्रासं विज्ञाय च महात्मना।
संक्षिप्तं विष्णुगुप्तेन नृपानामर्थसिद्धये॥

(1) सर्व्वैकनायकं राज्यं कुर्य्यान्न बहुनायकम्।

Sukra Niti, 1 Ch., 343.

न हि राज्ञः सुताः सर्व्वे राजेन्द्र तिष्ठन्ति भामिनि।
स्थाप्यमानेषु सर्व्वेषु सुमहाननयो भवेत्।
तस्माज्ज्येष्ठे हि कैकेयि राजान्यत्राधि पार्थिवाः॥
स्थापयन्त्यनवद्याङ्गि गुणवत्स्वितरेष्वपि॥

Ramayana, Ayodhya Kanda, 8 Ch., 23, 24.

(2) नान्धो राज्याधिकारी स्यात्

Debi Bhagabat Purana, 6th Skandha, 25 Ch. 4.

(3) तत एवाशेषराष्ट्रं विनाशमवेक्ष्यासौराजा ब्राह्मणानपृच्छत् भोः कस्मादस्मिन् राष्ट्रे देवो न वर्षति कीदृगपराध इति। ते तमूचुः। अयजस्व त्वं

4. A person who is deaf, a leper, mute, blind or impotent does not succeed to a Raj but his brother or son may. (4)

5. The following persons should be installed in the position of Yuavaraja by the king: the legitimate son, the younger brother, the uncle, the son of the elder brother, and the Dattaka son, in order, failing these a beloved daughter's son.(5)

6. The king should give his agnates means of enjoyment of life like what he himself possesses. The kingdom should never be divided. But the brothers may be established as feudal lords by giving to them a fourth of the kingdom. (6)

र्हेा यमवनिरूवया भुजाते परिवेत्ता त्वमित्युक्तः स पुनस्तानपृच्छत् किं मया विधेयमिति ते तमूचुः। यावद्देवापिर्न पतनादिदोषैरभिभूयते तावत्तस्याहँ राजा तदलमेतेन तस्मै दीयता मित्युक्तोतस्य मन्त्रिप्रवरेणाश्मसारिना तवारब्धं तपस्विनो वेदवादविरोधवक्तारः प्रयोजिताः ॥ ७ ॥

Devapi the elder brother having gone to the forest Santanu became king. Thereupon there was a great draught and famine. The Brahmins being asked the cause said that as long as Devapi is not disqualified by defects like Patitya, the kingdom is his and beacuse he has been superseded there has been this famine. Devapi was sent for &c.

Vishnu Purana Part 4 ch. 20 v. 7.

(4) जेाष्ठोऽपि वधिरः क्लष्ठी मूकोऽन्धःषण्ड एव यः।
सराजार्हो भवेन्नैव भ्रातातत्पुत्र एवहि ॥

If the eldest son is deaf, a leper, or dumb, blind or impotent, he does not deserve the Raj just as the younger succeeds in default of the elder, likewise the brother or son will succeed him.

(5) कल्पयेद्युवराजार्थमौरसं धर्म्मपत्नीजम्।
स्वकनिष्ठं पितृव्यं वानुजं वा गजसम्भवम्।
पुत्रं पुत्रीकृतं दत्तं यौवराज्येऽभिषिचयेत् ॥
क्रमादभावे दौहित्रं स्वप्रियं वा नियोजयेत्।

Sukra Niti ch. 2 v. 14-16.

(6) अतः स्वभोग सदृशान् दायादान् कारयेन्नृपः।
अव्याहताज्ञः सन्तुर्थे च्छत्रसिंहासनैरपि ॥

7. When there is natural born legitimate son, the adopted, the Kshetraja son and other sons cannot take the Raj. (7)

8. When there are no male members, daughters may take. (8)

9. Vicious eldest sons might be superseded.(9)

Let us now go to the ordinary principles which govern the rule of succession to impartible property as recognized by our courts. That the rule of primogeniture applies to such estates is admitted on all hands. The Privy Council have laid down that "if there is nothing to guide the mind to any other conclusion an impartible estate will descend according to the law of primogeniture"(1). But it is a matter of difficulty in many cases to ascertain whether the

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राजाविभजनाच्छ्रेयोन भूपानां भवेत् खलु।
अस्वीकृतं विभागेन राज्यं शत्रूर्जिघृक्षति।
राज्यतुर्य्यांशदानेन स्थापयेत्तान् समन्ततः।
चतुर्हिच्छथवा देशाधिपान् कुर्य्यात् सदादृपः॥
Sukra Niti ch. 346, 347, 137.

(7) चलजादींस्तनयान् न राजा राज्येऽभिषिचयेत्।
पितृणां कारयेन्नित्यमौरसे तनये सति॥
Kalikapurana cited in the Dattaka Mimansa.

(8) तेषां राष्ट्राणिगत्वा राजन् सुहृद्गतः।
भ्रातॄन् सुतांश्च पौत्रांश्च स्वे स्वे राज्येऽभिषेचय॥
कुमारो नास्ति कन्यास्तवाभिषेचय।
Mahabharata Santi Parva ch. 33 v. 43, 45.

(9) There are certain instances mentioned in the Puranas but no rule is to be found in them.

(1) Thakoor Isri Sing *v.* Baldeo Sing, 11 I. A. 145. Sree Achalram *v.* Udaypratap, 11 I. A. 51.

rule of lineal primoge niture or of primogeniture by proximity applies.

The rule of lineal primogeniture is also called the rule of representative primogeniture, as distinguished from the rule of primogeniture of proximity according to which which the person nearest in blood takes.

There are strong grounds for holding that the rule of primogeniture was based upon the military advantages that accrued to the State and the family in ancient times. As regards fiefs and military tenures, Bracton was probably right when he laid down that the rule was based on the principle that "the right of the sword suffers no division." From this it follows that in ancient times the command of the clan would go to a man capable of exercising it and the eldest living son would take and not the minor son of a predeceased elder son.* It is possible therefore that the rule of lineal or representative primogeniture did not prevail in very ancient times. Even in Henry II.'s time, in England it was "magna juris dubitato," whether a fief would be governed by lineal primogeniture or primogeniture by proximity.†

* Glanville. VII 3, Bracton 64 b.

† There was a time when in Europe the lord had the right of selecting the son who should succeed to a vassal's tenancy. The practice very soon fell into disuse. As regards female heirs, Henry III. seems to have rejected in practice their claim but when later law recognized their right it recognized also the right of the Crown to chose any one of the daughters to be the peeress though the lands descended to all as coparceners,

In more settled times and when juristic ideas and legal principles came to be enunciated and followed, the right of representation was established as a necessary logical consequence. The principle of representation came to be recognised in France while it was still regarded as doubtful in England. John could get himself recognized king in England in preference to his nephew Arthur but not in Normandy. But ultimately the continental rule came to be established in England also. In Glanville's time it was a doubtful point, but Bracton lays it down as settled law that the descendant always represents the ancestor in his rights of inheritance.*

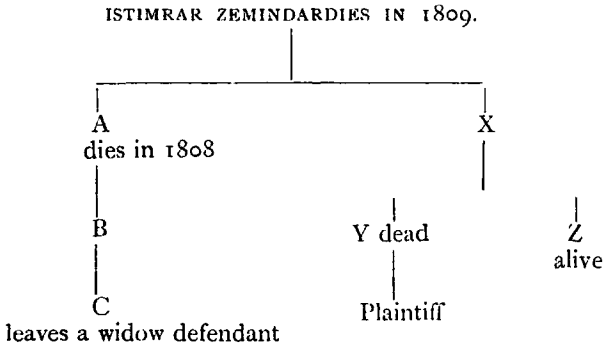
Mr. Mayne in his valuable book on Hindu Law expresses the following opinion on the subject.

"Property which is in its nature impartible, as a Raj or ancient Zemindary, can, of course, only descend to one of the issue ; which that one is to be will depend upon the custom of the family. In general, such estates descend by the law of primogeniture.† In that case the eldest son is the son who was born first, not the first-born son of a senior, or even of the first married wife (Manu, IX. § 125, 126). So long as the line of the eldest son continued in possession, the

* See History of the Law of Primogeniture by Kenny, p. 25.

† This presumption of course may be displaced by evidence showing that some other rule prevailed such as selection of the successor. Ishri Singh *v.* Baldeo Singh, 11 I. A. 135. See also Achal Ram *v.* Udai Pertab.

estate would pass in that line.* That is to say, on the death of an eldest son, leaving sons, it would pass to his eldest son and not his brother. But there is a singular want of authority as to the rule to be adopted where an eldest son, who has never taken the estate, has died, leaving younger brothers, and also sons. The point has been twice argued very lately before the Privy Council, but in neither case was it necessary to decide the question. The only cases that I am aware of in which the point was actually decided, were in Madras. The earlier cases arose in the same family, as will appear from the following pedigree. It only shows so much of the relationship as will render the litigation intelligible.



Here it will be seen that at the death of, the Zemindar he left a grandson, *B*, by an elder son, and a younger son *X*. The latter got possession of the Zemindary, but *B* brought a suit against

* See pedigree in Yenumula *v.* Ramandora, 6 Mad. H. C. 93; Narganti *v.* Venkatachelapati, 4 Mad. 250.

him, and ultimately recovered possession. There were circumstances in the case which might have justified the decree on other grounds, but on the whole it must be taken that the Provincial Court, which tried the case, went on the broad principle that the son of a predeceased elder son was entitled to the Zemindary in preference to a surviving younger son. No appeal was preferred against the decree. The estate then passed to *C*, at whose death it was claimed by the plaintiff, as son of *Y*, the deceased elder brother of *Z*. The original Court held, amongst other grounds for dismissing the claim, that *Z* was a nearer heir than the plaintiff. The decision was reversed by the Madras High Court, which held that by the ordinary law of primogeniture, applicable to impartible estates, the plaintiff represented the eldest line. It will be seen that there was an important distinction between the two disputed successions. In the first case *B* was the grandson of the last male holder, and therefore, in an ordinary case of succession, would have as good a claim as his uncle *X*; a son and a grandson being considered equally near, and equally efficacious. But in the second case the plaintiff and *Z* were cousins, and in an ordinary case of collateral succession the nearer takes before the more remote, as for instance, a brother before a nephew. This was the view submitted to the Judicial Committee. On the other hand

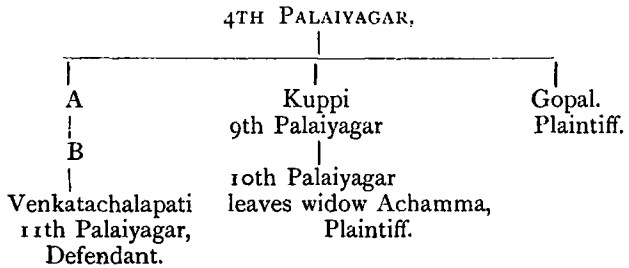
it was argued that the property, though impartible, was still joint family property, and therefore passed by survivorship, in which case *Y* was the heir expectant during his life, and at his death his rights passed on to the plaintiff who represented him. The Judicial Committee, however, found that there had been a partition of the whole property during the life of *B*, under which he took the Zemindary as separate estate. Consequently, the widow of *C* was the heir, and it was unnecessary to decide between the claims of the plaintiff and *Z*. (Runganayakamena *v.* Ramaya, P. C., 5th July 1879). Upon principle it would seem, that at the death of each holder the estate would go to the eldest member of the class of persons who, at that time, were his nearest heirs. If so, *Z* was certainly nearer to *C*, than the plaintiff. This seems to have been the ground of the decision of the Judicial Committee, in a case relating to the Tipperah Raj, where the question was, whether an elder brother by the half-blood, or a younger brother by the full-blood, would be the next heir to a Raj. They were pressed with the argument that on the death of the previous holder, who was the father both of the deceased Rajah and of the claimants, the Raj had vested in all the brothers jointly, though of course it could only be held by one. If so, of course, all the brothers were equally near to the father, and on the death of

one it would survive to the eldest. But the Committee held that in the case of an impartible estate survivorship cannot exist, as being an incident of joint ownership, which is inconsistent with the separate ownership of the Rajah, Therefore, title by survivorship, where it varies from the ordinary rule of heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a single heir. Then, upon the double ground of nearness of kin and religious efficacy, the whole blood was entitled in preference to the half blood (1); that is to say, they held that nothing vested in any member of the family until the death of the last holder, and that at his death the heir was the person who was nearest to him. Some of the language used by their Lordships in their judgment seems inconsistent with the Shivagunga case, and those cases which followed it, but the decrees themselves, and the *ratio decidendi* in each, are perfectly in harmony. The Shivagunga case settled that where an impartible Zemindary was joint property, the heir to it must be sought among the male coparcenary. That is to say, no female nor separated member could succeed. The Tipperah case decided, that amongst these coparceners

(1) Neelkristo Deb *v.* Beerchunder, 12 M. I A. 523, 540, Sc. 3 B. L. R. (Pc.) 13 ; Sc. 12 Suth. (Pc.) 21.

the person to succeed was the one who was nearest the last male holder at the time of his death, and that the principle of survivorship could not be applied so as to give the succession to a person who was not the nearest heir.

In a later case, when the succession to one of the Chittur Polliems was disputed, the Madras High Court followed its own dicision in *Runganayakumma v. Ramaya*, and refused to be bound by the principle laid down in the Tipperah case. The state of the family is shown by the diagram. On the death of a distant collateral



relation, Kuppi succeeded as 9th Palaiyagar by an arrangement with his elder brother *A*. The High Court found that the effect of this arrangement was, that the elder consented to resign his immediate right of succession and that of his descendants in favor of Kuppi and his descendants, but that any rights which *A* and his line might have in failure of Kuppi and his line were preserved intact. Kuppi was succeeded by his son, who died leaving no issue, a widow Achamma,

his uncle Gopal, and his cousin Venkatachalapati. The Government gave the Polliem to the last named person, and he was sued by both the widow and Gopal. The claim of the widow was dismissed on the ground that the family was undivided, and that of Gopal on the ground that the defendant was the nearest heir. The Court held that the ruling in the Tipperah case that co-ownership, and therefore survivorship, did not exist in impartible property, was opposed to the doctrine of the Shivagunga case, and to the ordinary law of Southern India and Benares, respecting the impartible property of a joint family. They laid down the canon that "when impartible property passes by survivorship from one line to another, it devolves not necessarily on the coparcener nearest in blood, but on the nearest coparcener of the senior line."

In a later case the judicial committee drew a distinction between lineal and ordinary primogenitures, which may perhaps reconcile the apparent conflict of cases (Achal Ram *v.* Udai Pertab, 11 I. A. 51). The estate was one of the Oudh Taluks. Under Act I of 1869 which governs such estates it is provided that each taluk is to be entered in one or other of certain lists, which regulate its mode of devolution. The estate in question was entered in the second list, which is a list of the taluqdars whose estates, according to the custom of the family before 1856, ordinarily

devolved upon a single heir. It was not entered in the third list, which included estates regulated by the rule of primogeniture. The plaintiff was the eldest surviving male of the eldest branch of the family of Pirthi Pal from whom descent was to be traced, but there were in existence other males of junior branches of the same family who were nearer of kin to Pirthi Pal than he was. The defendant admittedly had no title. Both Courts found that the estate went by the rule of primogeniture; by which apparently they only meant, that as between several persons of the same class, the eldest would be entitled to succeed. Both Courts found in favor of the plaintiff, but the Judicial Commissioner seems to have thought that his decision only went in favor of the family as against the defendant, and that the rights of the respective members of the family, *interse*, would be still open to discussion. The Privy Council reversed the decree of the Lower Courts. They pointed out that the plaintiff in ejectment must make out an absolute title in himself. It was necessary therefore for the plaintiff to make out that the estate descended according to the rules of lineal primogeniture as distinguished from descent to a single heir amongst several in equal degree. That when a taluqdar's name was entered in the second list and not in the third, the estate although it is to descend to a single heir is not

to be considered as an estate passing according to the rules of lineal primogeniture. Consequently that the plaintiff had not established a title which would enable him to evict a defendant in actual possession.

Possibly the following rules may be found to reconcile all the cases :—

1. When an estate descends to a single heir, the presumption is that it will be held by the eldest member of the class of persons, who would hold it jointly if the estate were partible.

2. In the absence of evidence to the contrary, the heir will be the eldest member of those persons who are nearer of kin to the last owner than any other class, and who are equally near to him as between themselves.

3. Special evidence will be required to establish a descent by lineal primogeniture, that is by continual descent to the eldest member of the eldest branch, in exclusion of nearer members of younger branches.

4. The presumption as to primogeniture of either sort may be rebutted by showing a usage that the heir should be chosen on some other ground of preference."*

I have quoted the above observations of Mr. Mayne in full so that you have every thing which can be said in favour of his position

* Mayne, Sec. 499-502.

which in my opinion is erroneous. There is another ground in favour of the contention of Mr. Mayne which ought to be mentioned here. The High Court of Madras has laid down a rule that inheritance to impartible property is governed by the ordinary rules of inheritance of Hindu law, subject only to the modification that when there are several heirs of the same degree, one only, *i.e.*, the eldest among them should take. This rule is incompatible with lineal primogeniture. But I have already told you that principles other than those which govern inheritance govern impartible estates and offices. They are governed by Kulachar. But this Kulachar among Hindus means succession of the eldest among sons. When there are no direct descendants, there are no rules of succession to be found in the Smritis or the Puranas. The rule of the Madras High Court would be a rule consistent with Hindu Law and easy of ascertainment. But unfortunately there is no justification for it in the ancient books. The logical inference from a rule of primogeniture would be representative primogeniture. As regards direct descendants, the rule has been established by ancient custom in India and is seldom questioned. That the son of a predeceased eldest son takes in preference to the surviving son, is a proposition which is not doubted. This goes against the rule of the Madras High Court and of Mr.

Mayne. As regards more distant heirs it would probably have been better to follow the said rule. But the custom of principalities in Europe of other Aryan nations is evidence of the custom of the ancient Hindus. Again the customs of the Rajput States would go to show that Hindu jurists like European jurists in very ancient times favoured the rule of lineal primogeniture as more logical of the two rules. Once it is conceded that the eldest son succeeds in preference to the younger, there is a natural expectation in the mind of the son next in birth that he and his children would take on failure of the line of the first son. There is nothing in Hindu law against this natural and logical position if it is conceded that the rule of primogeniture is primarily based on custom or Kulachar. There are two positions before you, first that the ordinary rule of inheritance subject to the modication of the eldest taking applies, and the second, that the rule of lineal or representative primogeniture applies. The question is a very difficult one. But the second is more logical and has been accepted as the custom of other Aryan nations and every thing goes to show that it is the custom of Hindus also. Colonel Tod cites instances from which it may be inferred that the rule of representative primogeniture prevails in all the Rajput States.

In England, Digby, in his valuable book on

the land tenures of England p. 84 says: "The point as to the respective rights of the younger son and a grandson (child of a predeceased elder son) was by Bracton's time settled by the adoption of the general principle that the issue represents the ancestor in infinitum." "Stated generally the rule is that among persons of equal degree in relation to the purchaser, males are entitled one after another in the order of their birth, females take together as coparceners" (p. 377). Again he says: "If the purchaser at his decease leaves no children or descendants surviving him, the lands will go to his nearest male ancestor, the paternal line being preferred to the maternal."

Mr. Mayne is of opinion that "special evidence will be required to establish a descent by lineal primogeniture, that is by continual descent to the eldest member of the eldest branch." But though he says that the question has been several times raised but never decided by the Privy Council, there have been several cases decided by the High Court, one of which is cited in the extract quoted above, and there has also been a recent case of the Privy Council, which go to establish a contrary rule.

In Bombay, it was held that under the Hindu Law, the son of a pre-deceased elder son takes in preference to a younger son (Ram Chandra *v.* Vencata Rao. 6 Bom 613). In

Madras also, the same rule has been laid down (1).

In a very recent case, the Privy Council held that primogeniture by proximity was only an alternative to lineal primogeniture. That was a case of an Oudh Talukdar entered in List II. of the Oudh Estates Act, *viz.*, one whose estates, according to the custom of the family, on and before the 13th February 1856, ordinarily devolved on a single heir. One of the contentions put before the Judicial Committee was that the family could elect one of themselves to be sole owner. It was held that such a custom was not primogeniture. The next question raised was whether the estate was governed by the rule of lineal primogeniture or the rule of primogeniture by proximity. Upon that matter the Privy Council made the following observations : "the first step is to ascertain whether the rule of descent was that of primogeniture. That it descended by custom to a single heir is the common case of both parties. The District Judge is of opinion that it descended by primogeniture not lineal. The alterative to lineal primogeniture is primogeniture by proximity of degree. But there is no evidence to prove such a made of descent and if there were, it would not help the defendant's case. Among

(1) Yenumealu *v.* Ramandara 6 Mad. H. C. 99.
Narganti *v.* Vencatachalapati 4 Mad. 250. See 23 I. A. 128.

those who are in equal proximity the elder line is to be preferred. During Nabi's life therefore, he was heir by proximity, and if he were to be considered as dead, his son Badsha would be heir to him. It has indeed been suggested in argument, mainly with an eye to the last part of the case that the family could elect one of themselves to be sole owner, but first such a custom is not primogeniture, and secondly, there is no evidence of it except that of the defendant himself and a statement made in mutation proceedings which will presently be examined. Independently, however, of the failure to show, an alternative there is good evidence in favour of lineal primogeniture." (1) This decision goes to favour the position that the senior line should be preferred and in such line the son takes the place of the father and that primogeniture by proximity should be considered as an alternative to lineal primogeniture.

In Bombay, we have already seen, it has been held in the case of a grandson by an elder son, that the rule of lineal primogeniture is the rule of Hindu Law and he takes in preference to a younger son. In Madras, the settled rule is that "when impartible property passes by survivorship from one line to another, it devolves not necessarily on the coparcener nearest in blood, but on the nearest coparcener of the

(1) Muhammad Imam Ali Khan v. Hasain Khan, 29 Cal. 81 P. C.

senior line". (1) The rule has been approved by the Privy Council. (2) In Bengal, in a recent case, the Privy Council while upholding a proved custom of lineal primogeniture, said that standing alone, it might not be sufficient to establish that the rule applied to collateral succession but it has an important bearing on it (3).

Again primogeniture, according to Act 1 of 1869 applicable to the Oude Talukdars, is lineal primogeniture.

Muhammedan kings, it appears, very often applied the rule of lineal primogeniture in the case of Hindu Rajes. It appears that in 1771, the Nawab Nazim of Murshidabad gave an opinion in favour of the custom in the Pachete Case (4).

It has also been held that one descended from a senior line is preferred to one descended from a junior line when there are others related in equal degree (5).

In a recent case, the Madras High Court laid down the following principles governing succession to impartible estates.

"The first of them is that a rule of decision in regard to succession to impartible property is to be found in the Mitakshara law applicable to

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(1) Narganti *v.* Vencata, 4 Mad. 250. Yenumala *v.* Ramandora, 6 Mad. H. C. 93. Kache Yuva *v.* Kache Kaliyan, 11 Mad. L. J. 191.
(2) Muttarvadaganadha *v.* Perisami, 23 I. A. 128.
(3) Mohesh Chunder *v.* Satrughan Dhal, 29 I. A. 62, 29 Cal. 343.
(4) 5 Moore, p. 84.
(5) Narendra *v.* Achalram, 20 I. A. 77. Mahammad Imam Ali Khan *v.* Husain Khan, 26 Cal. 81 P.C. Rup Sing *v.* Baisni, 7 All. 1 P. C.

partible property, subject to such modifications as naturally flow from the character of the property as an impartible estate. The second principle is that the only modification which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class, who would be entitled to succeed to the property, if it were partible under the general Hindu Law. The third principle is that in the absence of a special custom, the rule of primogeniture furnishes a ground of preference."(1).

No exception can be taken to the above rules, which are of a very general character. The judges, however, lay down another rule that an impartible estate may be a joint family property and the rule of survivorship is applicable and thus an elder half-brother may be preferred to a younger full-brother. This last proposition is not quite free from doubt, having regard to the recent decisions of the Privy Council mentioned above,(2) to the effect that an impartible estate cannot be an ordinary Hindu joint family property. In Muttarvadaganadha *v.* Perisami, 23 I. A. 128, the rule prevailing in Madras was affirmed, namely, "when impartible property passes by survivorship from one line to another, it devolves not necessarily on the

(1) Subramaya *v.* Siva Subramanya, 17 Mad. 325.
(2) Vencata Surya *v.* The Court of Wards, 26 I. A. 83.

coparcener nearest in blood, but on the nearest coparcener of the senior line." (4 Mad. 265). Under the Bengal School, it has been held that a full brother should be preferred to a half-brother (1), and that is also the ordinary rule under the Mitakshara. It would be simpler if the ordinary Hindu Law of succession applied to impartible estates, subject to the modification that if there are more than one person who would be the heir, the eldest among them should take, if they are of the same line, and the representative of the senior line should take, if they represent different lines. The rule of lineal primogeniture would however, not recognize the distinction between half blood and full blood.

It is also a rule of Hindu Law and the rule has been affirmed by a decision in Madras that the adopted son cannot succeed to an impartible estate when there is an Aurasa son (2).

It was certainly the ancient law of the Hindus that a Raj could not go to females. But it has been held by our Courts that unless a custom to that effect is proved, widows and daughters would take.(3) Among widows, the senior is entitled to preference before the junior (4), and as among daughters, the elder is preferred to the younger(5)

(1) Neelkristo Deb *v.* Beer Chunder, 12 Moore 523.
(2) Ramasami *v.* Sundralinga, 17 Mad. 435.
(3) Ramnand an Sing *v.* Janki Koer (Bettea Case), 29 Cal. 828 P. C.
(4) Vutsavay *v.* Vutsavay, 1 Mad. Dec. 453. Seenuvullala *v.* Tungama, 2 Mad. Dec. 40.
(5) Kathama Natchiar *v.* Dorasinga, 6 Mad. H. C. 310.

and though a daughter may take on the death of her sister, when all the daughters are dead, among daughters' sons the eldest in age and not the son of the eldest daughter or of the last surviving daughter should take (1). There is no right by survivorship among daughters (2).

Ghatwali tenures are supposed to be the exclusive property of the Ghatwal for the time being under Regulation 29 of 1814 and not his joint family property. When they are impartible, as they are as a rule, succession to them is governed by the law of primogeniture and in the absence of custom to the contrary, females are not excluded from succeeding to them (3).

In regard to Polliams also, females succeed when the custom of the exclusion of females is not proved (4).

In this connection, it should be observed that in Northern India, property cannot be taken by daughters or daughters' sons. A circular of the Chief Commissioner of Oudh, No. 42 of 1864, affirms this rule which was the original law of the Hindus, in respect to the great Kshatriya families. It is quite clear that in old times impartible estates never went to females.

It has been held in an Orissa case, that

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(1) Mutta Vaduganatha *v.* Dorasinga, 8 I. A. 99.
(2) Muttu Vaduganatha *v.* Perisami, 23 I. A. 128.
(3) Doorga Persad *v.* Doorga Koeri, 4 Cal. 190 P. C. Chhatradhary Sing *v.* Saraswaty Kumary, 22 Cal. 256.
(4) The Collector of Madura *v.* Veracamoo, 9 Moore 446.

an illegitimate brother may take an impartible estate by the rule of survivorship (1).

It was thought in Madras, that the younger son by a senior wife was entitled to succeed before his elder by a junior wife. The proposition was based on a misinterpretation of Manu IX, 122-125 (2) and the Privy Council have held that it has no foundation in Hindu Law (3). There may however be a valid custom that the younger son by the senior wife should succeed before his elder by junior wife and a younger son by a wife of the higher caste should be preferred to an elder son by an inferior wife (4).

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(1) Jogendra *v.* Nityanund, 18 Cal. 151, 17 I. A. 128.

(2) पुत्रः कनिष्टो ज्येष्ठायां कनिष्ठायां च पूर्व्वजः ।
कथं तत्र विभागः स्यादिति चेत् संशयोभवेत् ॥
एकं वृषभमुद्धारं संहरेत स पूर्व्वजः ।
ततोऽपहरेत् ज्येष्ठवृषस्तदूनानां स्वमातृतः ॥
ज्येष्ठस्तु जातौ ज्येष्ठायां हरेद्वृषभषोडशाः ।
ततः स्वमातृतः शेषा भजेरन्निति धारणा ॥
सदृश स्त्रीषु जातानां पुत्राणामविशेषतः ।
न मातृतो ज्येष्ठमस्ति जन्मतो ज्येष्ठमुच्यते ॥

If there be a doubt, how the division shall be made, in case the younger son is born of the elder wife (then the son) born of the first wife shall take as his additional share on (most excellent) bull; the next best bulls (shall belong) to those (who are) inferior on account of their mothers. But the eldest (son, being) born of the eldest wife, shall receive fifteen cows and a bull; the other sons may then take shares according to (the seniority of) their mothers; that is a settled rule between sons born of wives equal (in caste) (and) without (any other) distinction no seniority in right of the mother exists; seniority is declared (to be) according to birth. Manu Ch. IX., V. 122-125.

(3) Jagadish *v.* Sheo, 28 I. A. 100, 23 All. 369. Pedda Ramapper *v.* Bangari, 8 I. A. See 17 W. R. 55.

(4) Sundaralingasami *v.* Ramasami, 26 I. A. 55.

The adopting mother has also been preferred to a senior wife of the father as heir to her son (1).

The rule of succession to impartible property is generally based on custom. In the Tippera Case, there was supposed to exist a peculiar custom that a Raja on succeeding to the State, appoints one to be the Yuvaraj and another to be the Bara Thakoor, of whom, on the death of the Raja, the Yuvaraj became the Raja and the Bara Thakoor became the Yuvaraj. (2) The custom is now questioned and the matter is pending decision before the High Court.

As regards the Talukdars of Oude succession has now been regulated by legislation (Act 3 of 1863). The taluks of second and fourth lists are to be governed by the rule of primogeniture, which according to the Act, means lineal primogeniture. But as regards the list I., the taluks devolve on a single heir and we are left to ascertain the rule from the custom of the family. The taluks of class 5 are also governed by family custom.

The impartible Taluks of Oudh have also been classified under two divisions, under section 8 of Act I of 1869, namely, those that devolve on single heirs, and those the succession to which is regulated by the rule of primogeniture. Custom governs the succession to the former and in one case, it was decided that "a custom

(1) 26 I. A. 246. (2) 12 Moore 523.

which was like the law known as of tanistry was found to prevail in a family, by which out of several sons an able one had to be selected and nominated." (1)

As regards the Garjat Rajas of Orissa succession is governed by the customs recorded in the Puchees Sawal. Instead of giving you the customs here, I shall insert the material portions of that document in my book for the use of lawyers. There have been several cases about the Garjat Rajas from the time of the Sudder Dewani Adalat which have upheld the Puchees Sawal. (2)

As regards the impartible estates of Chotanagpore and Hazaribagh, they are governed by custom. Colonel Dalton and Mr. Hunter made records of their customs which are useful in ascertaining such custom. But there is no such recorded custom in regard to them as to render proof unnecessary and the peculiar custom of a family has to be proved in each case by evidence.

It was a well-established custom among Hindus in ancient times that the king should at some period invest the heir-apparent (generally when he attained majority) with the rights of the Yuvaraj. That was often preparatory to abdication. The eldest son had always the right to become the Yuvaraj, but it seems that the king sometimes exercised his prerogative to supplant the

(1) Thakur Ishri *v.* Baldeo Sing, 11 I. A. 145.
(2) 4 Select Reports 39, 6 Select Reports 42, 296, 1 Sudder Report 16, 3 W. R. 116.

elder, as was done in the case Rama. The example however, shows that in strict Hindu Law, the eldest could not be set aside, as Bharat the Yuvaraj, who was made Raja, never assumed the kingship, except as the representative of Rama for twelve years and resigned it on the return of the later from the conquest of Lanka. This custom of abdication is also affected by certain modern Rajaes. In the Durbhanga Raj, it was proved that the custom of succession in that Raj was that the Raja abdicated in his lifetime in favour of the eldest son or the next heir who succeeded to the Raj (1). It has also been held that abdication in favour of the son was allowable and the son in such a case, can question alienations by the father even in his lifetime. (2)

The law as to succession to Vatans has become complicated on account of several settlements and legislation mentioned in the last chapter. The assessment of rent in lieu of services and discontinuance of service were supposed by some authorities as making the estates partible and alienable of themselves. The law has now been settled that land granted with a condition of service attached to the grant cannot be resumed when the service is no longer required. But land granted as remuneration for service may be resumed when the service is no

(1) Gonesh *v.* Moheshwar, 6 Moore 164.
(2) Luchme Narain Sing *v.* Gibbon, 14 W. R. 197.

longer required, except when there has been a grant of an hereditary office to those who are to perform the service, in which case, the land can only be resumed when the need of such service altogether ceases, but where the services are still required and the grantee has a right to the hereditary office he cannot be deprived of the land on the mere ground that the grantor prefers to appoint some one else to officiate or to do away with the service. (1) Discontinuance of services attached to an impartible Vatan, it has been held, does not alter the nature of the estate and make it partible. (2) A Full Bench of the Bombay High Court considered the question as to the effect of the Bombay Acts 2 of 1865 and 7 of 1863. It held that lands affected by those Acts became alienable when the services were abolished, except in cases where there is a concurrent family custom operating to keep the Vatan estate together. Such a custom may continue and may singly bind the hands of the successive holders of the property after the former restriction has failed or been removed. The abolition of public duty does not alter the nature of the estate. If the family

(1) Bhimapaiya *v.* Ramchandra, 22 Bom. 422. Forbes *v.* Meer Muhamed Tagore, 13 Moore 464. See Ravji *v.* Mahadev Rao, 2 Bom. H. C. Re. 1 (A. C. J.) 237. Krishnaji *v.* Vethalrav, 12 Bom. 80. Krishnarao *v* Rangrao, 4 Bom. H. C. Re. 1 (A. C. J.) 11. Radhabai *v.* Anantrao, 9 Bom. 208. Lakshman *v.* Narayunrao, 14 Bom. 82. See sec. 56 of the Bombay Hereditary Offices Act 1874.

(2) Ramrao *v.* Jeshvantrao, 10 Bom. 327.

custom forbids alienation beyond the lifetime of the alienor, the custom will operate equally after the patrimony has ceased to be a Vatan as before. Where however, such a concurrent custom does not affect an estate and it is freed from its connection with the public office, the reason arising from that connection for the preservation of the estate necessarily fails and the lands become subject to the ordinary law of descent and disposal. (1) It is difficult to see how custom can affect the law of descent in such cases. The analogy between the military tenures and lands attached to civil offices has led to lands attached to the latter being often considered impartible. Military tenures though they had the burden of military service attached to them, were under the old Hindu system impartible heritable estates. As to lands attached to civil offices, the officers were liable to dismissal and in that case the lands went to the person appointed to the service though he might not belong to the family of the late incumbent. The old Hindu custom was that village offices were hereditary having lands which followed the office which ordinarily devolved on the eldest son of the incumbent. To apply the custom of kingdoms to lands attached to petty village offices is going to an unreasonable length.

However that may be, it is now settled that

(1) Radhabai *v.* Ramchandra, 9 Bom. 198.

when a custom of impartibility has been proved Vatans are governed by the law of primogeniture. But the Bombay Courts say that succession to these Vatans is governed by the rule of the right of eldership of the senior member (1). In the case of Gopalrao *v.* Trimbakrao, a decree of 1773 passed by the Minister Raghunath Bajirao · Peshwa was produced, according to which the custom of the Mhaske family whose property was in dispute, was held to be that the succession went always to "the eldest whose business was to affix the seal and signature and conduct all the business" and the descendants of the younger son received lands for maintenances and "in addition money for defraying the expense of wedding and other household matters." The right of eldership spoken of here probably means the right of the eldest branch to succeed and not the right of the eldest representative of the family. But the wording of the decree of the Peshwa is not clear nor the judgment of the High Court. The right of eldership would ordinarily mean the right of the eldest member to succeed. But the head-note of the case says that the law of primogeniture was held to prevail. The head-note apparently is correct. Under Act 3 of 1874, succession to Vatans coming within the purview of

(1) Gopalrao *v.* Trimbakrao, 10 Bom. 598. Ramrao *v.* Yeshvantrao, 10 Bom. 327.

the Act is govered by Sections 26, 27, 33 and 36 and by Section 2 of Act 5 of 1886. Under the Act the Collector should ascertain the custom of families and register representative Vatandars. In case of the death of a representative Vatandar, the Collector should register the name of the eldest son. Adopted sons are entitled to succeed. In case of females, only widows of the last holder are entitled to succeed, every other female member or person through a female being postponed to every male member of the family qualified to act. But in case of a widow succeeding there should be a male deputy appointed who could act for her.

In Madras, succession to hereditary offices called Karnams are regulated by the provisions of Reg. 29 of 1802 which have received judicial interpretations in several cases. Under Sec. 7 of Reg. 29 of 1802, the Zemindar is bound to appoint from among the heirs of the deceased Karnam in order that the office may remain hereditary in the family but, he can pass over the nearest heir in case of personal incapacity. On the constructions of this section it has been held that the widow or any other female heir is not entitled to succeed and the nearest male Sapinda succeeds (1). It has also been held that in case

(1) Alymalammal *v.* Vencataramayyan, S. D. A. Decisions Mad. 1844, p. 83. Vencataratnamma *v.* Ramanujasami, 2 Mad. 313. Vencata *v.* Rama, 8 Mad. 257. Chandramma *v.* Vencataraju, 10 Mad. 226.

of the minority or other incapacity of the heir, the nearest male Sapinda will succeed and subsequent removal of the incapacity, such as minority, will not entitle the heir to claim the office after such removal (1). It has also been held that the heir entitled to succeed is the heir to separate heritable property and the daughter's son is thus entitled to succeed before the brother's son (2).

I have already given you a description of Madras Tarwads. I have now to tell you of the mode of succession of the manager or Karanavan. The following account of the principal Malabar family and the rule of succession, governing it is to be found in the judgment of the High Court of Madras in Vira Rayen *v.* Vaha Rani Pudia, in which we find the following observations. "The parties to this suit are members of the Tamuri Rajas or Zamorins of Calicut. The family comprises three Kavilagoms or houses—the *Pudia*, *Padiyara* and *Keyaka* Kovilagoms of these each has its separate estate, and the senior lady of each Kovilagom, known as the *Valia Tamburathi* of the Kovilagom is entitled to the management of the property of the Kovilagom. There are five stanoms or places of dignity with separate

(1) Vencatanarayana *v.* Subbarayuda, 9 Mad. 214.
(2) Krishnanoma *v.* Papa, 4 Mad. H. C. 234. Seetaramayya *v.* Vencatarazu, 18 Mad. 420.

properties attached to them, which are enjoyed in succession by the senior male members of the Kovilagoms. These are in order of dignity—(1) the *Zamorin*, (2) the *Eralpad*, (3) the *Munarpad*, (4) the *Edartharapad*, and (5) the *Nadutharpad*; and it would seem that, at the beginning of the century, there was also a sixth stanom known as the *Elbaradi Terumapad* (Buchanan, p. 83), but as no mention is made of this stanom in the present proceedings, it may be that it has ceased to exist.

The senior lady of the whole family, who is known as the *Vaha Tamburath*, also enjoys a stanom with separate property; this stanom is termed the *Abadim Kovilagom*.

In the management of the properties of the three Kovilagoms the senior ladies are often assisted by the males or Rajas who in time may pass out of the Kovilagom and attain one of the separate stanoms.

There are no family names and the stanom-holders are distinguished after their deaths by the name of the year in which they respectively died. All property acquired by the holder of a stanom, which he has not disposed of in his lifetime, or shown an intention to merge in the property attached to the stanom becomes, on his death, the property of the Kovilagom in which he was born. Property acquired by any member of the Kovilagom is in accordance

with the principle recognized in the case of the joint Hindu family, presumed to be the common property of the Kovilagom unless proof is given that it has been acquired otherwise than with the aid of the common funds, and as in other Malabar families, properties are sometimes entrusted to the possession of a member, who is not by the customary law entitled to their management either for the purposes of management or as an assignment for maintenance. Such arrangements are made at the pleasure of the *Vaha Tamburath* of the Kovilagom, who can also at her pleasure resume any properties which have been so dealt with."

The mode of succession in Madras Tarwads and Illums was settled very early. It has been held that in a Tarwad governed by the Marumakkatayam rule, the property is impartible and can be held by the family in its collective capacity the members individually being only entitled to maintenance and not to call for an account from the Karanavan. The senior member of a Tarwad has an absolute right to succeed as Karanavan (1). Similarly it was held that the eldest member of a Nambudri family to manage the Illum is absolute (2). There are two systems under the Malabar law, the Marumakkatayam and the Makkatyam. The former denotes the

(1) Kumguratu *v.* Arrangaden, 2 Mad. H. C. 12.
(2) Nambiatan *v.* Nambeatan, 2 Mad. H. C. 110.

succession of nephews and the latter the succession of sons. The Nairs, as a rule, are governed by the former; the Nambudris by the latter. The Tiyars of Calicut are governed by the Makkatyam rule, and among them even all self-acquired property vests in the Tarwad by custom and the brother succeeds in preference to females (1) in the property of the Tarwad which is always impartible (2).

I have already given you a description of the rule of devolution in Tarwads under the Marumakkatayam system. The spirit of the system is that the joint property belongs to the females, but because of their incapacity, the eldest male member becomes the manager or Karanavan whose position is that of a lifetrustee of the joint estate. The eldest male member to whatever branch of the family, whether descendants of the son or of the daughter, he may belong, is entitled to be Karanavan. In the absence of any male member, the eldest female becomes the Karanavan. (3) When the entire body of the members of Tarwad are dead, the property may be taken by another Tarwad which may be its reversioner *i. e.*, which is the nearest branch descended from the same ancestress.

It has been held that a blind man is not

(1) Rareehan *v.* Perache, 15 Mad. 281.
(2) Raman Menon *v.* Chathune, 17 Mad. 184.
(3) Subramanyan *v.* Gopala, 10 Mad. 223.

entitled to succeed as Karanavan and may be removed even though he has acted for sometime (1). But when he has so succeeded by consent of all parties, it has been held, a suit by him against a Kanomdar, who is not a member of the family, cannot fail on the ground of his blindness (2).

A person suffering from ulcerous leprsoy which is not congenital is not disqualified under the Malabar law (3). Adoption is allowed in Malabar. When there is a natural born son however, there can be no adoption. In the case of a Alayasantana family, it was held that when the last female member who had a son suffering from ulcerous leprosy which was not congenital, an adoption by her was invalid (4).

In a Tarwad the right of the eldest member is an absolute legal right and he cannot, it has been held, renounce in favour of the next senior Anandravon, the term by which members of the Tarwad are called (5). The reason of the decision is difficult to appreciate.

I have already mentioned to you the rule of Polliams. But there is a class of Palayam called Dayadi Pattans of Madura which are impartible and inalienable. In these estates

(1) Kanaran *v.* Kungan, 12 Mad. 307.
(2) Unkandan *v.* Kunhunni, 15 Mad. 483.
(3) Chanda *v.* Subba, 13 Mad. 209.
(4) Chanda *v.* Subba, 13 Mad. 209.
(5) Govindan *v.* Kannaran, 1 Mad. 353, N. A. Cherukomen *v.* Ismala, 6 Mad. H. C. 145.

a peculiar custom prevails which is thus stated. "On the demise of the Palayagar for the time being, the estate devolves not on his heir according to the Mitakshara law which in the absence of a special custom governs this part of Southern India, not on the eldest son according to the rule of primogeniture, which obtains in the other Polayams in the district owned by persons of the Kamblar caste, but on the Dayadi or cousin of the deceased Polayagar who is senior in age and who is descended from one of the three brothers who originally formed a joint Hindu family" (1). This rule was laid down by the High Court in the case of Amma Ganakanur Polliam granted originally in ancient times by Visvanada Nayak, the founder of the Nayak dynasty of Madura.

In several cases the question has arisen whether, when a Raj has been confiscated by the Government and regranted, the rule of succession remains as before and whether the property continues to be a joint family property. In the Shivagunga case (2) and the Nazved case (3) and the Hanspore case (4) it was held that the property, in such a case, became the self-acquired property of the grantee. In the last case on the point, which was about the Bettia Raj, the East

(1) Sivasubramama *v.* Krishnammal, 17 Mad. 287.
(2) Katama Natchia *v.* Raja of Shivagunga, 9 Moore 539.
(3) Vencata Rao *v.* Court of Wards, 2 Mad. 128, 7 I. A. 138.
(4) Beer Pertap Sahi *v.* Rajender Pertap Sahi, 12 Moore 1.

India Company had seized the Raj having driven out the Raja for acts of rebellion and placed it under the management of its officers. Subsequently they effected a division of the Raj Estate, reinstating in one portion of it, the heir of the former holder and granting the other portion to members of another branch of the family. The Privy Council held that the re-instatement under the circumstances should be treated as proceeding from the grace and favour of the Government in the exercise of their sovereign authority and the portion restored became thenceforth the separate self-acquired property of the heir, notwithstanding the fact that certain Babuana grants had also been, made to the junior members. But as to the rule of succession it was held that the old custom governing it as an impartible estate continued and it descended to a single heir, though unaffected by the rule of survivorship. (1) No doubt, where an impartible Raj has been confiscated and regranted the presumption is that it has been granted with all the incidents of the old Raj, (2) but the circumstances of the granting it again may be such as are inconsistent with the continuance of the old character of the Raj and to make it an ordinary Zemindary. (3)

(1) Ramnundun Sing *v.* Junke Sing, 29 Cal. 828.
(2) See 12 Moore 1, 8 I. A. 99. See also Vadrevu *v.* Vadrevu, 3 Mad. Ind. Jud. 521.
(3) Miranzi Zemindar *v.* Satrucharla, 18 I. A. 45. Vencata Narasinha *v.* Narayya, 7 I. A. 38, 2 Mad. 128.

I have already given you my opinion about the legal incidents of accumulations to impartible estates. The question of succession to acquisitions by the holder of an impartible estate is often a very difficult one. These Rajas assume to themselves the character of kings. According to the Common Law of England, the king being a Corporation, purchases of real property made by him after the assumption of the Crown vest in him in his sovereign capacity and descends to his successor, 'still purchases made before the accession to the Crown or descent from collateral ancestors after the accession of the Crown vest in a natural capacity' (See Coke upon Littleton 156, note 4), showing that even in England, the monarch could take real as well as personal property in his own right. (1) In England, all real property, as a rule, goes to the eldest son and the personal property is divided among the heirs in India no such distinction has been made. But the Lawgivers did make a distinction between immoveables and moveables. Over moveables, the holder has full power of disposal even in an inalienable estate. Land may be impartible and inalienable, but to attach those incidents to other things than what are called the regalia, is going too far. The Crown, the sceptre, the jewels that are worn by the Raja and the Rani, furniture

(1) 7 Moore 497.

and decorations of palaces, the elephants, the horses, the arms and accoutrements and the like follow the Raj. But how can money accumulated by a Raja be called impartible and inalienable? It would be a just and equitable rule to hold that succession to all acquisitions and moveable properties is governed by the ordinary rules of inheritance. But immoveable properties may be acquired from the income of the impartible estate under circumstances, that the Raja meant them to be accretions to the Raja. In such cases, they could follow the Raj. I have told you that the law of acquisition by widows would probably govern the law of acquisition by holders of impartible estates. The law regarding succession to accumulation by widows however, is not quite free from difficulty. In the case of Isridutt Koer *v.* Hunsbutty (1) it was held, that if the widow does not dispose of accumulations during her lifetime, they cannot be considered as her Stridhana and must follow the parent estate. In a later case (Sheolochun *v.* Saheb) (2) the Privy Council made the following observations: "*prima-facie*, it is the intention of the widow to keep the estate of the husband as an entire estate, and that property purchased would *prima-facie* be intended to be accretions to that estate. There may be, no doubt, circumstances

(1) 10 Cal. 324 P. C.
(2) Sheolochan Sing *v.* Saheb Sing, 14 Cal. 387 P. C.

which would show that the widow had no such intention, and she intended to appropriate the savings in another way." In a more recent case the Calcutta High Court held that the case of Sheolochun *v.* Saheb would indicate, that if there is no presumption of the savings having been accumulated by the widow for the benefit of the next heirs "then you must look to the facts of the case to ascertain what the intention of the parties was with regard to the fund." In Bombay, it has been held that the existence of debts by the widow rebuts the intention to accumulate."(1) In Madras, it has been recently held that in "the absence of an indication of her intention to the contrary the widow must be preserved 'to retain absolute control over the investment of the deceased husband's property and the burden of proving the contrary cannot be placed on a purchaser from her."(2) According to the analogy of the widow, all accumulations should be considered as accretions to the impartible estate until a contrary intention on the part of the acquirer is proved. But there is some difference between the position of the widow and that of a male holder of an impartible estate. The latter can dispose of the entire property without any legal necessity which the former cannot. The

(1) Rivett Carnac *v.* Jivi Bai, 10 Bom. 478.
(2) Akanna *v.* Vinkayya, 25 Mad. 351. Kasinath *v.* Uthumana, 12 Mad. L. J. 1.

widow's position is more like that of a trustee than that of a full owner, though as a matter of law, she has been held not to be a trustee for the next heir. A Raja's position is quite different. However that may be, acquisitions of immoveable property out of the savings of the impartible estate should be considered as accretions to the latter, unless a contrary intention is proved. That rule however should not be applied to moveables. Impartibility can be an incident of land only. To make personal property impartible would work very hardly on younger sons, and I know of no rule of law or custom justifying the position that even moveables are impartible, when acquired by the holder of an impartible estate. Having regard to the fact that there may be two different rules of succession governing self-acquired and ancestral properties held by a person(1), there can be no difficulty in holding that succession to moveables belonging to a Raja is governed by the ordinary rule of inheritance, though the Raj may pass to only one among the heirs. In an old case, the Madras High Court held that personal property left by the holder of an impartible property 'whether separately acquired or whether it is acquisition derived from ancestral property,' was divisible

(1) The rule was laid down in the Shivagunga case and since followed in many cases.

among the heirs, and it seems to me that the rule laid down was a just one. (1)

In a recent case, the Privy Council held that when some mouzas had been purchased out of the savings of the impartible estate and the collections made by the same Raj servants and the collection papers kept with the papers of the Raj, no intention of the Raja was proved to incorporate the mouzas with the ancestral estate for the purposes of succession, and they must follow the ordinary rule of the Mitakshara inheritance law as to self-acquired property (2).

(1) Sri Sri Raja Rajeswara Gajapaty *v.* Sri Sri Virapratapah Rudra Gajupatty Narain Deo Maharagalunguru, 5 Mad. H. C. 31.
(2) Parbati Kumari Debi *v.* Jagadis Chunder Dhabal, 29 Cal. 437.

LECTURE V.

Judicial Proceedings about Impartible Estates.

In judicial proceedings regarding impartible estates, the most important matter for consideration is the evidence of customs which govern them. There is a certain misapprehension very general among lawyers and text-writers about the validity of customs under the Hindu Law. It is therefore necessary to consider the history of the law of custom among ancient Hindus in order to make the matter clear.

The law of custom has a very interesting history in Hindu law. The laws of the Hindus are based on ancient custom. But from time before the Vedas, we find that they had been intermixed with religious rules and clarified into a code by Manu and other Rishis, some of whom are supposed to have existed in very remote times and to have formed the constellation of stars called the Saptarsi. Custom could, therefore, have no place in the law of the Hindus. Where the books are silent, and in doubtful matters, the opinion of an assembly of learned and good men

was to prevail. That was the orthodox view. The law of the sages was, however, meant for the pure Aryans, the three twice-born classes, for whom rules for the guidance of every act of life from 'procreation to death," were strictly prescribed in the books. The only exception to the rule was that the customs of guilds of artisans and merchants and of the lower classes were recognized as fit to be given effect to. Again, the Aryans were then a conquering race and the Lawgivers ordained that the customs of conquered races should not be disturbed. But no custom when it was opposed to morality or public policy or abhorred by the people could be enforced. This was the orthodox view of the validity of customs.

Colebrooke's translation of the passages of the Mimansa on the subject runs as follows: " Besides the evidence of precept from an extant revelation or recorded hearing (Sruti) of it, another source of evidence is founded on the recollections (Smriti) of ancient sages. They possess authority as grounded on the Vedas, being composed by holy personages conversant with its contents, nor was it superfluous to compose anew what was there to be found, for a compilation, exhibiting in a succint form that which is scattered through the Veda, has its use. Nor are the prayers that the Smriti directs unauthorized for they are presumed to have been taken from passages of revelation not now forth-

coming. Those recollections have come down by unbroken tradition to this day, admitted by the virtuous of the three tribes, and known under the title of Dharma Sastra, comprising the institutes of law, civil and religious. Nor is error to be presumed which had not, until now, been detected. An express text of the Vedas, as the Mimansa maintains, must then be concluded to have been actually seen by the venerable author of a recorded recollection (Smriti).

But if contradiction appears, if it can be shown that an extant passage of the Veda is inconsistent with one of the Smriti, it invalidates that presumption. An actual text present to the sense, prevails before a presumptive one.

Or though no contrary passage of the Veda be actually found, yet if cupidity or other exceptional motive may be assigned revelation is not to be presumed in the instance, the recollection being thus impeached.

Usage generally prevalent among good men and by them practised understanding it to be enjoined and therefore incumbent on them, is mediately, but not directly, evidence of duty, but it is not valid, if it be contrary to an express text. From the modern prevalence of any usages, there arises a presumption of correspondent injunction by a holy personage who remembered a revelation to the same effect. Thus usage pre-supposes revelation. Authors, however,

have omitted particulars, sanctioning good customs in several terms, but any usage which is inconsistent with a recorded recollection is not to be practised so long as no express text of scripture is found to support it." (1)

But notwithstanding all the pretensions of the sages to having established one uniform religious code for the three twice-born classes, customs, of which traces are found in the Vedas like the elegibility of paternal and maternal aunts' daughters for marriage which had been abrogated in the Law books, were still found among Brahmins who had gone to the south of the Vindhya Hills. The laws were codified, it thus appears, in northern India long after southern India had been conquered and settled by the Aryans. There was a great divergence of opinion among the Lawgivers about the validity of such customs among the twice-born classes, which were against their teachings. Gautama declared them to be invalid. Bandhayana seemed to agree with Gautama. Vrihaspati recognized them. But whether recognized by the Lawgivers or not, the customs did not cease to exist and they still exist. Marrying a deceased brother's widow existed till very recent times in Orissa and still exists in the Himalayan regions. However that may be, it lay with the king to abrogate a custom, if it were immoral or opposed

(1) Colebrooke's Miscellaneous Essays, pp. 337, 338.

to public policy that is the view of all the Lawgivers. According to the Lawgivers, therefore, the following customs are valid. .

1. Customs of cultivators, artizans, money-lenders, companies of tradesmen, dancers and ascetics.

2. Ancient customs of provinces, castes and families of peoples other than the Aryan Hindus of the twice-born classes. Certain marriage customs of the south are recognized. Excepting these, no customs against the teaching of the Smritis are allowable.

3. Family customs may be valid when not opposed to the Smritis, among the three twice-born classes.

4. No customs that are considered immoral, opposed to public policy or abhorred by the people should be given effect to.

The customs of provinces, families &c., mentioned by the Lawgivers probably did not refer to impartible estates. As I have said before, impartible estates strictly speaking are estates attached to the office of the king and other public offices and managers of endowments. This is an idea of lawyers of later growth. It is the feudal system and the military tenures, to which we should properly look for the incidents of impartible estates. The customs about these estates which we find mentioned in the Puranas are the customs of the great royal houses, like

those of the Raghus and the Kurus, and in modern times we have the feudal customs of the Sesodias and the Rahtores "all sons of the same father." The Ramayana speaks of the custom of the family of Raghus. Now to apply the customs of Raghus to the descendants of men who by robbery or chicanery in times of political changes acquired large properties, would have raised the smile of the ancient Hindu commentators, though modern pundits and Mahamahopadhyayas would invent texts as applying to their cases and trace their descent from the sun or the moon. Indians, in the absence of authentic history, place events 200 years old and 5000 years old on very much the same footing. All events the origin of which is little known, are made to appear as ancient as the great deluge. In this state of things when the authentic history of a family is unknown and very often purposely falsified, the Courts are left to the ordinary rules about customs.

Blackstone lays down the following rules about a valid custom which should be known to you :—

1. "It must have been used so long, that the memory of man runneth not to the contrary, which being interpreted means, that it must be proved to date at least from the commencement of the reign of Richard the First, either by positive evidence or by a legal presumption arising

out of proof of sufficient antiquity in the absence of proof to the contrary.

2. A custom must have been continued, or in other words, it must have been uninterrupted in its operation.

3. It must have been peaceable and acquiesced in.

4. It must not be unreasonable ; it will be good if no good legal reason can be assigned against it.

5. A custom ought to be certain, or in other words capable of being ascertained ; for in law, id certum est quod certum reddi potest.

6. A custom must be compulsory and not left to the option of every man, whether he may use it or no.

7. Customs must be consistent with each other, one custom cannot be set up in opposition to another.

8. A custom in derogation of the general law must be construed strictly ; and lastly,

9. No custom can prevail against an express Act of Parliament."

The custom of impartibility, it should be understood, is, according to Hindu ideas, so far as principalities are considered, not attached to the estate but is Kulachar or custom of the family. It may be otherwise in the case of lands attached to offices.

The Courts have always expressed great

reluctance to allow the usages of families of no importance in derogation of the general law. In Basantrav *v.* Mantaffa (1. Bom. H.C. 43), the Judges said that it would be a dangerous doctrine that any petty family should be at liberty to make a law for itself. Again in a case (Tarachand *v.* Reebram, 3 Mad. H. C. A.C.J. 50) the principles laid down in which have been recently set aside in other respects, the Judges said, "the authors who deal with this subject, are all discussing customary law as applicable to a whole community or a large section of it. They would never have conceived it possible for a customary law antagonistic to the general law to be established by evidence of the acts of a single family confessedly subject to that general law. There are now three generations of this family, and we entertain as little doubt upon principle as upon authority that no evidence of their acts or opinions could establish what could not be law but an anomaly." In a later case, the Bombay High Court went further and held that no evidence of the acts of a single family repugnant or antagonistic to the general laws will establish a valid custom (Madhavrao *v.* Balkrishna, 4 Bom. H. C. Rep., 113 A. C. J.). But all these decisions have been modified by more recent decisions, which have established the rule that the custom of a family may be given effect to if it is properly established. The Privy Council

have thus laid down the law : "A custom is a rule which in a particular family or a particular district has from long usage obtained the force of law" (1). Again in another case they say : "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty in which alone the legal title to recognition depends."(2) Again their custom must be proved to be "certain, invariable and continuous." (3)

We have already seen how under the Muhammadan rule the large Zemindaries usually went to one person. The conditions under which Zemindaries have come to be held since the permanent settlement are essentially different from those under which they were held during the Muhammadan times. There can thus be no presumption now of impartibility as regards

(1) Ramsahory *v.* Balmukend, 3 I. A. 259.
(2) Ramlakshi *v.* Sivanath, 14 Moore 570.
(3) Rajkissen *v.* Ramjoy, 1 Cal. 186 P. C.

large Zemindaries. Shama Charan Sircar [in his Digest, p. 19 (footnote) 2nd edition], says that 'the effect of the Bewasta and the judgment in the old Sudder Dewany case of Ishanchand *v.* Issurchunder Roy, is to clothe huge Zemindaries with the attributes of principalities.' That position was the result of the confusing of the old state of things with the new, which came into existence with the permanent settlement. It has been authoritatively held by the Privy Council that there is no presumption that an estate if very large is impartible (1).

Except in the case of military tenures and other estates attached to offices in Muhammadan times, only large Zemindaries, Rajes and Polliams and the like were impartible. But modern cases have established that other estates, even if not large, may be impartible. In the case of Chowdhury Chintamon Sing *v.* Mussamut Nowlukho Kunware (2 I. A. 263 ; 24 W.R. 255) their Lordships laid down the following rule: "It seems to their Lordships too late to question what is affirmed by many reported cases that a custom of descent according to the law of primogeniture may exist by Kulachar or family custom, although the estate may not be what is technically known either as a Raj in the north

(1) Zemindar of Merangi *v.* Sri Raja, 18 I. A. 45. Sremantu *v.* Sremantu, 17 I. A. 134.

of India or a Polliam in the south of India (1). In theory, indeed being an exception from the general rule, custom must be of origin as ancient as the law itself. But our Courts though they have refused to recognise the custom of a family which dates from a comparatively short time (2), have presumed an ancient valid usage on proof of its existence as an uniform custom for a sufficient length of time."

The question thus arises what length of time will raise the presumption of an ancient immemorial custom. In Doe d Jugmohun Ray *v.* Nimu Dasi (Montrou 596), Chief Justice Grey made the following observations : "Although in this country we cannot go back to that period which constitutes legal memory in England *viz.*, the reign of Richard I., yet still there must be some limitation without which a custom ought not to be held good. In regard to Calcutta, I should say that the Act of Parliament in 1773 which established this Supreme Court, is the period to which we must go back to found the existence of a valid custom, and that, after that date, there can be no subsequent custom nor any change made in the general law of the Hindus, unless it be by some Regulation by the Governor-General in Council which has been duly registered in this

(1) Bhau Nanaji Utpat *v.* Sundrabai, 11 Bom. H. C. 249. Mallikarjuna *v.* Durga, 13 Mad. 406 ; 17 I. A. 134. Nitta Pal *v.* Joy Pal, 19 All. 1, 24 I. A. 147.

(2) Umritnath *v.* Gowreenath, 13 Moore 542. Bhau Nanaji *v.* Sundrabai, 11 Bom. H. C. 249. Benimadhub *v.* Joykrishna, 7 B L.R. 152.

Court. In regard to the Mufassil we ought to go back to 1793. Prior to that there was no registry of the Regulations and the relics of them are extremely loose and uncertain. 'I admit that a usage for twenty years may raise a presumption in the absence of direct evidence of a usage existing beyond the period of legal memory." In a recent case the Privy Council laid down that in certain cases a custom proved to have existed since 1793 may be considered as immemorial, and even evidence of unbroken custom for 80 years since the British occupation of a province has been held to be sufficient (1).

But 'when an estate has remained undivided for six or seven generations and descended as an impartible estate to a single heir, that fact is not sufficient to raise a presumption of unbroken family custom, which could not be rebutted by evidence that may be tendered to show earlier partitions of the family, whereby a larger estate had been broken up into several smaller portions one of which is the estate in question.' 'When there is no evidence of enjoyment by a single member of the family for six or seven generations, and all that is proved is that during that period the estate had never been divided, the fact is not sufficient to control the operation of the rule of Hindu Law'(2).

(1) Gararudhwaja *v.* Saparandhwaja, 27 I. A. 238.
(2) Thakur Durryao Sing *v.* Thakur Dari Sing, 13 B. L. R. 167 P. C.

It has been held that well-established discontinuance of a valid custom may destroy it. (1) It was thus that the Susung Raj which was a military grant and an impartible estate came to be held as a partible one. When as we have seen, that even in the case of large Zemindaries there is no presumption of impartibility, the party setting up a custom of impartibility or inalienability must prove it.

It is often a question of difficulty to ascertain what evidence is admissible to prove the custom of impartibility and lineal primogeniture. In a recent case, the Privy Council made the following observations:

"The High Court relied on the oral evidence which was very fully discussed in the Court of first instance. There was abundant evidence to show that it was well understood in the family and in families belonging to the same group that no descendant of a younger branch could take until all the elder branches were exhausted. But there again no witness was able to point to an actual instance in which in case of collateral relationship, the rule had either been followed or departed from. The evidence would have been much stronger if the witnesses had been able to cite instances confirming their view. But still the evidence is not to be disregarded.

(1) Ram Kissen v. Ramjoy, 1 Cal, 186.

"The High Court relied principally on certain decrees relating to disputes in families belonging to the same group of families, in which it was decided that the rule of succession was lineal primogeniture. These decrees do not of course bind the parties to the present, but they go a long way to show the prevalence of the custom among families having a common origin and settled in the same part of the country.

"Lastly the High Court relied on the precedence conferred or marked by the titles of honor given to the sons of the reigning Raja in order of seniority—a precedence which would naturally be attached to lines of descent traced from them. All these various considerations point in one direction and in one direction only," *i. e.* the custom of lineal primogeniture.

Oral evidence, even opinions by Rajas of the same group of families, and judgments not *inter partes* in families of the same group are thus evidence of the custom of impartibility under circumstances mentioned above.

As to hearsay, the Privy Council have laid down, that "it is admissible evidence for a living witness to state his opinion on the existence of a family custom, and to state as the grounds of that opinion information derived from deceased persons, and the weight of the evidence would depend on the position and

character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay." But such evidence must be corroborated by proved facts, such as the descent of the estate for a long period of time. Otherwise much reliance should not be placed upon such evidence standing alone (1). Evidence that the custom of Gaddenashini or Masnadinashini and receiving nuzzur on the occasion of sitting on the Gadi has been held as good evidence of impartibility (2).

You know the rule that when the inheritance has once vested it cannot be devested. But in the case of an impartible estate in Madras, it has been held by the Privy Council (3) that when it has vested in the brother of the last holder, a son afterwards adopted by the widow will divest the said brother. This decision can only be supported on the ground that in an undivided Mitakshara family the son adopted under authority from the husband must be considered as coming under the rule of Gautama by which a posthumous son takes his share from the agnates.

Suits for the recovery of impartible property

(1) Garuradhwaja *v.* Saparandhwaja, 27 I. A. 251.
(2) Thakur Nitrpal *v.* Thakur Jaising, 23 I. A. 147. See 27 I. A. 251.
(3) Srivirada Protapa *v.* Sri Brojo Kishore, 1 Mad. 69.3 I. A. 154.

belonging to a joint family is barred on the expiry of 12 years from the time when the exclusion from possession or enjoyment of the property became known to the plaintiff, under Art. 127 of the Limitation Act. It has been held that the burden of proof in these cases is on the defendant to show exclusion for 12 years (1). But it seems to me that in case a person has been in actual possession of impartible property excluding another, the burden ought to be on the latter when he pleads that the suit is saved from limitation on the ground that it is joint property and that he has been excluded within 12 years of suit (2).

What constitutes exclusion and separation is thus a very material one in deciding whether a suit for the recovery of immoveable property is barred by limitation. It has been held that separate enjoyment of maintenance and *babuana* grants, separate mess and residence may be quite compatible with the retention of the contingent coparcenary interest by the junior members (3). The matter has been discussed by me in Chapter III., where I have told you that the position is not quite intelligible to me. The

(1) Umesh *v.* Jagadish, 1 C. W. N. 543. Jivat Bhat *v.* Anibhat, 22 Bom. 259. Rukmanoni *v.* Motilal, 4 Bom. L. R. 135. Sellam *v.* Chinnamal, 24 Mad. 441.

(2) See Raghunath *v.* Moharaj, 11 Cal. 777 P. C.

(3) Sartrajkuary *v.* Deorajkuari, 10 All. 272, 15 I. A. 51. Sevagnana *v.* Perisami, 1 Mad. 312, 5 I. A. 61. Doorga *v.* Doorga, 4 Cal. 190. Chintamon Sing *v.* Nowlukho. 1 Cal. 153. Rup Sing *v.* Baisni, 11 I. A. 149, 7 All. 1.

Courts have however seldom found that any plaintiff satisfied the above position (1). But when a junior member was not very distantly related to the last holder, had been residing in the Gur, had the expense of marriage of daughter &c. paid by the Raj, had a common worship, and did all acts which showed his retaining his rights as a member of a joint family, he should be considered joint and in enjoyment of such right. The matter of collateral succession when there is a widow and the question of limitation stands very much on the same footing. But there is a difference between an ordinary joint Hindu family and a joint family to which impartible property belongs. I have already told you my opinion about impartible property belonging to a joint family. But in as much as the Privy Council has held that it is possible that the incidents of a joint family should appertain to an impartible property, the matter is not open to discussion in a Court of law. Accepting that position, it is a very difficult matter to prove participation in the property on behalf of the junior members. It must follow from it, that separate enjoyment of *babuana* or maintenance allowances may be considered participation. If that is so, there never can be any separation. It has also been held that in a suit

(1) Vadreva *v.* Vadreva, 3 Mad. Ind. Juris. 529. See 29 Cal., p. 840.

for general partition when some portion of the family property was partitioned and the rest was held to be impartible, the fact did not constitute separation (1). The matter is one of very great difficulty in the present state of the law.

Suits for arrears of maintenance by junior members of a family are barred by 12 years limitation. It has been held that a junior member may bring a suit for maintenance and recover past maintenance for 12 years in that suit, it not being necessary to prove a demand for each year's maintenance as it became payable (2). It has been held that wrongful withholding of maintenance constitutes the cause of action (3). The withholding may be proved either by demand and refusal or by circumstances which would amount to a refusal of maintenance. Non-payment of maintenance does not necessarily amount to denial of the right, though it may be *primafacie* evidence of wrongful withholding. (4) Past maintenance may be decreed at the rate found payable for future maintenance in a suit for declaration of the right of maintenance, or at a lower rate according to circumstances and the future and past maintenance should be a charge on the impartible estate (5).

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(1) Raja Yarlagadda *v.* Raja Yarlagadda, 27 I. A. 151.
(2) 27 I. A. 151. 3 Bom. 421.
(3) Malikarjuna *v.* Durga, 24 Mad. 147 P. C. See 3 Bom. 420.
(4) 27 I. A. 151.
(5) Raghubans *v.* Bhagwat, 21 All. 183. Raja Yarlagadda *v.* Raja Yarlagadda, 27 I. A. 151.

Pending a suit for partition, a younger brother or widow may claim maintenance as a provisional means of support. (1)

A suit for the recovery of an impartible property alienated must be brought within 12 years of the death of the last holder, male or female. In case of Vatans and hereditary offices, it has been held in Bombay and Madras that in the absence of fraud or collusion, a predecessor fully represents his successor in the matter of limitation, and except in the case where the alienation is *ab initio* void, when limitation runs from the date of the grant, limitation will run from the date of the death of the alienor (2).

But difficulties sometimes arise when the widow, where there is no right of female succession, is in possession for more than 12 years of the impartible estate. Does it become her own Stridhan property ? Ordinarily it would be. But when the widow retains possession as widow alleging a right of female successsion, it may be reasonable to suppose that her possession is not adverse to the heirs of her husband who should get the property after her death and not the heirs of her Stridhan. In a case about Vatans, the question arose in the following way : A widow

(1) 27 I. A. 160.
(2) Babaji *v.* Nava, 1 Bom. 535. Radhabai *v.* Anantarao, 9 Bom. 198. Veerabhadra *v.* Vellanke, 10 Mad. L. J. 114. Gnana *v.* Velu, 27 I. A. 69. Chidamlaran *v.* Memmal, 23 Mad. 439.

was in possession adversely to her son for more than twelve years. The son when he came into possession as the heir of the said widow brought a suit against a mortgagee from the widow. It was held that the suit was not barred as the Vatan was inalienable and a mortgage by the widow could have no force beyond her life-time, because the restriction that an alienation by way of mortgage of any portion of a Vatan has no effect beyond the lifetime of the Vatandar, is an incident of the tenure, and the heir of the holder without legal title except adverse possession, was entitled to the benefit of it (1). It has also been held in the case of a Nambudri Illam in Madras, that when a grant is made not for any necessity of the Tarwad, and the grantee is in possession for more than twelve years, he can not be ejected by the succeeding Kanaravan or manager of the family Tarwad (2).

In the case of a Ghatwali, the Privy Council held that the possession of a tenure created by a preceeding Ghatwal was not adverse against his successor until some definition or assertion of adverse title has been made (3).

In the case of maintenance grants, the Privy Council in a later case have held that even a notice by the grantee alleging permanent

(1) Padapa *v.* Swami Rao, 24 Bom. 566 P C., 29 I. A. 86. Kalu Narayan Kulkarni *v.* Hanmapabin Bhamapa, 5 Bom. 435.
(2) Madhava *v.* Narayana, 9 Mad. 247.
(3) Tekait Ram Chundera *v.* Srimoti Mudho Kumari, 12 I. A. 188. See Petambar *v.* Nilmoney, 3 Cal. 793.

right would not make his possession adverse (1). It has been held in the case of leases by a female holder, and the same rule must be applicable to male holders of inalienable estates, that when they are without necessity they are not wholly void but only voidable, and that acceptance of rent even when it has been deposited by the lessee in Court after the death of the widow, by the reversioners confirms the permanent lease (2). As a necessary corollary, it has been held that on the death of a widow the suit by a reversioner to recover possession of immoveable property by setting aside a permanent lease executed by her is governed by the rule of 3 years' limitation under Art 91 and not by Art 144 of the Limitation Act (3). The same rule would apply in the case of male holders of impartible inalienable property.

A decree obtained against the holder of an impartible Raj when it is not inalienable is Res Judicata against his successor. But when it is inalienable, as in the case of Vatans and in case of hereditary offices, a decree obtained against the holder for the time being is Res Judicata when obtained without fraud or collusion (4). There was a very learned discussion

(1) Beni Prosad *v.* Dudnath, 27 Cal. 156, P. C.
(2) Modhoosudun Sing *v.* Rooke, 24 I. A. 164, 25 Cal.
(3) Bejoy Gopal Mukerje *v.* Nilratan Mukerje, 30 Cal. 990.
(4) Radhabai *v.* Annantrao, 9 Bom. 198. Veerabhadra *v.* Vellanke, 10 Mad. L. J. 114. Vencayya *v.* Suramma, 12 Mad. 235.

of the question contained in a judgment of Sir Raymond West and I cannot do better than read it to you, as it will give you a clear idea of the principles governing such cases :

"In the case of self-acquired property, a judgment affecting it is necessarily *resjudicata* against a succeeding holder taking through the judgment-debtor. In the case of ancestral estate a judgment on the right to it against a father must generally be *resjudicata* as regards his issue (1). Mayaram Sevaram *v.* Jayvantrav Pandurang (2) ; Pitam Singh *v.* Ujagar Singh (3), though a decree in a suit, seeking to make the patrimony answerable for a father's transactions, will generally not bind the sons, unless they are made parties (4), (5). Even a widow, limited as her estate is, represents the expectant heirs in a suit directed against the property on a title not derived from her—see the cases of Babaji *v.* Nana (6) and Jugol Kishore *v.* Maharaja Jotindro Mohan Tagore (7) ; and if a judgment obtained against a father would not bind his issue, there would be virtually no limitation to suits claiming property as ancestral. A fraudulent and collusive suit will entitle the son

(1) West and Buhler H. L., 162, 163.
(2) Printed Judgments for 1874, p. 41.
(3) I. L. R. 1 All. 151.
(4) West and Buhler H. D. 168, 617, 750.
(5) Ibid, 642.
(6) I. L. R. 1 Bom. 536.
(7) Nephews were held to have been represented by their uncle. Naragan Gop Habbu *v.* Panduring Ganu, I. L. R. 5 Bom. 685.

to get the judgment, by which he is wronged, set aside; but, apart from fraud, the law of res judicata must guard titles against claims of members of joint families and heirs to ancestral estates, equally as against any other claims.

In the case of collateral succession (8), the collaterals, after the generation in which a grant or conveyance was made, must come in by heirship, seeing that a gift to persons unborn is not recognized by the Hindu law (9). As representing a public interest they might get an improvident alienation or incumbrance set aside—Rajah Nilmoni Singh *v.* Bakranath Singh (10) but as heirs they take through their predecessors in title the property of the latter, in a quantity and quality determined by the rights established against it, as well as those established in its favour (11), as one and the same estate, not as several estates in the hands of successive possessors or groups of possessors. In the case of an impartible Zamindari, it has lately been held at Madras, the Sivagiri Zimindar *v.* Tiruvengoda (12), that a compromise embodied in a decree against an ancestor gave a right of execution against his issue, though this involved a severance of part of the estate, and though in the language of the Judicial

(8) West and Bupler H. L., 179, 185, 217.
(9) See L. R. 9 I. A., 104.
(10) West and Buhler H. L., 162.
(11) I. L. R. 7 Mad. 339.
(12) L. R., 9 I. A. at p. 122.

Committee "the same principle which precludes a division of a tenure upon death must also apply to a division by alienation," Rajah Nilmoni Singh *v.* Bakranath Singh (1). The case just referred to shows that the collateral public interest might guard an estate which, apart from that connexion, would become subject to all the ordinary incidents of property.

In the case of a *vatan* or property held on a tenure of public service, it follows, from the considerations already stated, that each holder of office in succession, being subject to the service, may, or at least might, under the Hindu Law and Regulation XVI of 1827, insist, as against his predecessor's alienation, on a restoration of the property to its intended uses: Rajah Nilmoni Singh *v.* Bakranath Singh (2). It is in this sense probably that the learned judges in Kuria *v.* Gururavz, said that a *vatan* is held "on a tenure of successive life-estates." No holder could dispose of the *vatan* for a term extending (as the cases have determined) beyond his own life. But the validity, as against the issue, of a decree as to the ownership of a particular field or area, obtained against the ancestor rests on different considerations. The observations of Mr. Reeves on the operation of the English Statute De Donis are here very

(1) See L. R. 9 I. A. 104,120,121.
(2) 9 Bom. H. C. Rep. 282.

pertinent. "It was intended," he says, "by that Act to bind up the hands of the tenant-in-tail from prejudicing his issue, but not to preclude third persons from pursuing their lawful claims against the land entailed. It could not be said in opposition to *their* right that the will of the donor should be observed. The Statute provides only against voluntary alienations, and, among others, declares that a fine levied upon such entailed land shall be void—a fine being at that time an amicable suit for the single purpose of transferring the possession and right of land. But to all involuntary alienations, to all recoveries by right, such land entailed was still liable notwithstanding the strict restraint on alienation by the owner" (Reeves's History of the Common Law, Vol. III, p. 330). In other words, an entail or a dedication to a public service can not affect the right of outsiders to lands not embraced in it, or which could not legally be embraced in it. If, then, a *vatan* is an estate, as it seems to be, it would be contrary to sound legal principles that the same man should have to prove again and again in successive suits that a piece of land held by him as his own did not form part of the *vatan*. For the quieting of titles here, as in the case of an ancestral property of the usual kind, it is necessary that some one should be recognized as capable of representing in litigation the

aggregate of interests, in virtue of which he is in possession of the *vatan*. (1) Under the Hindu law the son in each generation represents his father, and takes up his persona as centre of a connected group of rights and liabilities in the fullest possible sense. (2) As regards the issue, therefore, of a *vatandar* against whom a judgment has been given, it seems that no doubt ought to be entertained of their being bound by the judgment as *res-judicata*. A *vatan*, recognized as such, cannot legally pass away from the *vatandar* family—Wamnaji *v.* Parashram (3), and even though the family should have divided into several branches with rights enjoyed in rotation, this does not seem to constitute for each branch so distinct an estate that, on its falling into possession, that branch can claim to revive a contest in which another branch has already been defeated (4) : Smith *v.* Lord Brownlow (5), Phillips *v.* Hudson (6). Under the Regulation law each branch as it succeeded to the office and the emoluments constituting the *vatan*, might claim to renew the struggle as representing *an inalienable public interest* ; but this interest is now placed under the guardian-

(1) See Code of Civ. Proc. (XIV of 1882). S. 13. Expl. 5.
(2) West and Buhler H. L., 162, 165, 216.
(3) Printed Judgments for 1884, p. 220.
(4) See Code of Civ. Proc. (XIV of 1882). S. 30.
(5) L. R. 9 Eq. 241.
(6) L. R. 2 Ch. Ap. 243 ; Comp. Nandun Lall *v.* Lloyd, 22 C. W. R., 74 Civ. Rul.

ship of the Collector, who has absolute power to defeat a judgment that would withdraw land from the *vatan* holding. (1) The *private right* should not be incapable of final determination. It is not, in fact, ever disputed that a *vatandar* in possession may singly sue to recover property wrongfully severed from the *vatan.* He is not called on to join every one however remotely interested as a plaintiff: Comp. Pyke *v.* Crouch.(2) But if he has the capacity thus to represent the aggregate of interests in a successful suit, he must have it equally in an unsuccessful suit, and in the absence of fraud, he must have it no less in a suit in which he is defendant. In the case of the Zamindar of Sivgiri *v.* Arunachala (3) the High Court of Madras says: "His (the Zamindar's) arguments is, that a creditor who wants to make a Zamindari available is bound to sue, not only the Zamindar for the time being, but all those possible successors to whom the estate may pass before the debt is liquidated. The effect of this, however, would be to raise a great number of collateral issues* * It seems to us that Zamindar represents the estate during his life for all practical purposes." This was in the case of an impartible Zamindari, which might be supposed to bear the closest resemblance to an

(1) Bom. Act. III. of 1874, s. 10.
(2) I. Lord Raym, 730.
(3) I. L. R. 7 Mad. 335.

entailed estate under the Statute De Donis in England; (1) yet the decree against the father was given effect to on the estate in the hands of the son: Muttayan Chettiar *v.* Sangili Vira Pandia Chinatambier. (2) Property dedicated to religious purposes is, by Hindu law, inalienable: Maharanee Shibessouree Debia *v.* Mothooranath Acharjo(3),(4); Khushalchand *v.* Mahadevgiri;(5) yet a decree obtained without fraud against one Mahant or Shebait binds his successors: Golab Chand Baboo *v.* Prasanno Coomari Debia, (6) Jevun Dass Sahoo *v.* Siah Kubeeroodeen (7), Prosunno Coomari Debia *v.* Golab Chand Baboo (8). He fully represents the estate in litigation, and a judgment for or against him is *res-judicata* for his successor though in case of an alienation or incumbrance limitation is computed against the successor only from his succession: Mohunt Burm Suroop Dass *v.* Khashee Jha (9).

How far English precedents can or cannot help us in our present inquiry, may best be gathered, perhaps, from *Ferrer's case* and the notes in Thomas and Fraser's edition of Coke's Re-

(1) West and Buhler H. L. 161.
(2) L. R. 9 I. A. 144.
(3) 13 Moo. I. A. 273.
(4) West and Buhler H. L. 201, 741, 785.
(5) 12 Bom. H. E. Rep. 214.
(6) 20 Calc. W. R. 86.
(7) 2 Moo. I. A. 392.
(8) L. R. 2. I. A., 150.
(9) 20 Calc. W. R., 471.

ports (Part VI,76). An adjudication under the Common Law did not prevent the pursuit of the same right by an action of a higher nature, and thus even the same plaintiff who had failed in a *formedon in descender* might sue again in a *formedon in reverter remainder*. He could not have a new *formedon in descender*, but his issue-in-tail could. This was a consequence of the express provision of the Statute De Donis (1). "So," Coke says "if he be barred in a writ of error on the release of his ancestor, his issue shall have a new writ of error, for he claims, not only as heir, but *per formam doni*, and by the Statute shall not be barred by feigned pleading or false pleading of his ancestor so long as the right of the entail remains." On the same principle it was that a warranty given with an entail was itself entailed, so that a release of the warranty by an ancestor could not bar the issues (2). But these decisions rested on the explicit language of the statute. But for the Statute of Westminster II., as Coke says, even if the tenant-for-life, where the remainder was over in fee, had suffered a recovery, he in the remainder was without remedy a consequence which Coke approves, as tending to prevent a multiplicity of suits on the same cause of action. The power thus placed in the hands of the tenant-for-life was so abused that the assent of the person in

(1) See Revised Statutes, Vol. I., p. 42.
(2) Co. Lit., 392. B.

remainder or reversion was made necessary by the Statutes 32. Hen. VIII c. 31 and 14 Eliz. c. 8, but still with saving in favour of any who should recover against the tenant-for-life by a real, not a fictitious title. Thus in a really contentious suit the tenant-for-life represented not only his own interest, but all interests in succession to it, though these were drawn from a source higher than his own estate. The entailed warranty, too, would lose all its efficacy for the issue by the ancestor advantage of it, though fictitiously, in the feigned action of recovery (1). A fictitious recompense in lands awarded, from the common vouchee enabled the tenant-in-tail, on the principles settled in Taltarnm's case to bar the estate tail itself with the remainders and the reversion depending on it (2). The strong tendency of the English jurisprudence to give effect to a judgment obtained against the actual holder of a freehold estate in this way defeated the stingent provisions of the Statute law.

The subsequent history of this branch of the English law need not be traced. In the present day the complete representative capacity of the holder of an estate of inheritance is unquestioned (3). It is plain that, even where the Legislature had pronounced against alienation, the force of a judgment

(1) Co. Lit, Ub. Sup.
(2) Cruise's Dig. Vol. V. 270; Shepp. Touch. Vol. I., p. 39, Note 6.
(3) See per Lord Eldon in Coekbura *v.* Thompson, 16 Ves. 326, and Lloyd *v.* Johnes, 9 Ves., at pp. 56-57.

recovered was so great, and the difficulty of distinguishing after many years between contentious and amicable proceedings was so great, that the doctrine of *res-judicata* became the commonest foundation of ownership. Nor could the ascription of lands to the support of public services prevent this when the devolution of estates without a new appointment or sanction by the Crown at each descent had once been recognized. (1) All lands were held immediately or mediately from the Crown on various tenures of service, the due performance of which could not but be impaired or endangered by alienation; yet alienation, mostly by judicial forms, became the almost universal rule, recognized as inevitable and beneficial as the special liability of the land for the chief public services became obscured in the later developments of the political and fiscal system.

English analogy, then, points clearly to this, that, in the absence of express legislation to the contrary, the holder of an hereditary estate, such as a *vatan* is, represents in litigation the aggregate of interests in the land which, for the time being, centre in him. By a suit in which he is successful he wins for all: by one in which he fails he loses for all. The exceptions rest on temporary contractual relations, on defect of the estate, or on specific statutory provisions.

(1) The decision in Raja Nilmoni Singh *v.* Bakranath Singh, L. R. 9 I A. 104, 124, turns on the same point.

If we look to the continental systems derived from the Roman law, we find the same efficacy given to judgments obtained against the holders of restricted estates. The law of substitutions derived from the Roman law of *fidei-commissa* and of substitutions, though very different from the latter, was once widely prevalent. It wholly forbade any alienation such as to impair the estate of a successor; yet as the holder, while he hold the property, held it as owner, all rights and liabilities as to suits concering the estate centred in him: *ipsiet in ipsum competunt.* Consequently, a successful suit on a right contradicting his title effaced at once both his title and the substitutions depending on it. The "remainder men" or the guardians of the substitution, could intervene to prevent illicit dealings or to protect the proceeds of necessary sales; but they could not avert the operation of *re-sjudicata* resulting from an honest contest. Another consequence of the "persona," to which the estate was annexed being completely filled, was that a title by prescription acquired against the life-holder was acquired against all his successors. As all rights centred in him, that adverse act, and the submission to it, which extinguished them in him extinguished them altogether (1). According to the Scottish law, an action *bona fide* litigated by an heir of entail is *res-judicata* in questions

(1) See Pothier Tr. Des. Substitutions, 5 passim.

with succeeding heirs (1), and the force of judgments extends much further than would be necessary of the adjudication of the present case.

It would seem, then, to be a general principle of jurisprudence that a mere special line of descent or mode of devolution prescribed in particular cases, does not make the property subject to it exempt from the effects of a judgment against the person in whom at the time the estate is vested. The particular law of devolution in such a case no more involves such a consequence than the general law of devolution which would otherwise operate. Where the aggregate estate is not fully represented, *res-judicata* can affect it only to the extent of the representation."

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(1) Ersk. Tr. Vol. II., p. 1137.

LECTURE VI.

The Origin and History of Hindu Endowments and their Main Divisions.

Among the ancient Hindus, there is no trace of the setting up of idols for worship, and therefore there could not be any dedication of property for that purpose. We find the Vedic Hindus addicted to *Yagas* or *Yajnas* which meant sacrifice of animals, eatables, clarified butter and *soma* wine through the fire. Fire was the object of constant worship, the companion in birth, marriage and death of the Hindus. The Vedas mention many Gods, Indra, Mitra, Varuna, Rudra and others, and sacrifices to them. But the sacrifices were through the fire. Sacrificial animals were burnt, and *soma* poured into it. In the Rig Veda 10M, 15S 2, we find the Fire addressed in the following words:—"Thou carriest the *soma* articles to the Gods after making them fragrant." The fire was therefore called Hutabaha, the carrier of sacrifices.

I cannot do better than quote the words of the late Professor Prannath Pandit Saraswati, who once occupied this chair, and was a learned Brahmin of the most orthodox type, in support of the proposition that there were no images or

temples of images in Vedic times. He says: "The religion of the Vedas differs widely from the present popular religion of the Hindus. 'The deities to whom the songs are for the most part addressed are the following :—First Agni, the god of fire. The songs dedicated to him are the most numerous of all—a fact sufficiently indicative of the character and import of these sacrificial hymns. He is the messenger from men to the gods, the mediator between them, who with his far-shining flame summons the gods to the sacrifice, however distant they may be. He is for the rest adored essentially as earthly sacrificial fire, and not as an elemental force. The latter is rather pre-eminently the attribute of God to whom, next to Agni, the greatest number of the songs is dedicated, *viz.*, Indra. Indra is the mighty lord of the thunder-bolt, with which he rends asunder the dark clouds, so that the heavenly rays and waters may descend to bless and fertilise the earth. A great number of the hymns, and amongst them some of the most beautiful, are devoted to the battle that is fought because the malicious demon will not give up his booty ; to the description of the thunderstorm generally, which with its flashing lightnings, its rolling thunders, and its furious blasts made a tremendous impression upon the simple mind of the people. The break of day, too, is greeted ; the dawns are praised as bright,

beautiful maidens; and deep reverence is paid to the flaming orb of the mighty sun, as he steps forth vanquishing the darkness of night and dissipating it to all the quarters of the heavens. The brilliant sun-god is besought for light and warmth, that seeds and flocks may thrive in gladsome prosperity.' (1)

"Besides the three principal gods, Agni, Indra, and Surya, the hymns of the Veda sing the praises of a great number of other divinities, chiefly, "the Maruts, or winds, the faithful comrades of Indra in his battle; and Rudra, the howling, terrible god, who rules the furious tempest," (2). According to *Yaska* (3), the famous etymologist of the Vedas, whose *Nirukta* is the only treatise of its kind which has survived to our day, there are in substance only three gods in the *Veda*:—*Agni* on the earth, *Vayu* or *Indra* in the sky, and *Surya* in heaven, of each of whom there are many appellations expressive of his greatness and of the variety of his functions." The number of Vedic Gods is given at thirty-three (4), increased millionfold in more degenerate times. "The divinities worshipped (in the Veda) are not unknown to later systems, but they there perform very subordinate

(1) Weber's History of Indian Literature, 2nd edition, 1882, p. 40.
(2) Same as (1).
(3) Quoted in Wilson's Translation of the Rig Veda. Vol I. p. XXXIX; Muir's Texts, Vol. V, p. 8.
(4) Muir's Texts, Vol. V, p. 9.

parts, whilst those deities who are the great gods —the *Dii majores*—of the subsequent period, are either wholly unnamed in the *Veda*, or are noticed in an inferior and different capacity. The names of Siva, of Mahadeva, of Durga, of Kali, of Rama, of Krishna, never occur, as far as we are yet aware : we have a Rudra, who, in aftertimes, is identified with Siva, but who, even in the *Puranas*, is of very doubtful origin and identification, whilst in the Veda he is described as the father of the winds, and is evidently a form of either Agni or Indra ; the epithet Kaparddin, which applied to him, appears, indeed, to have some relation to a characteristic attribute of Siva,—the wearing of his hair in a peculiar braid ; but the term has probably in the *Veda* a different signification—one now forgotten—although it may have suggested in aftertime the appearance of Siva in such a head-dress, as identified with Agni ; for instance, Kaparddin may intimate his head being surrounded by radiating flame, or the word may be an interpolation : at any rate, no other epithet applicable to Siva occurs, and there is not the slightest allusion to the form in which, for the last ten centuries at least, he seems to have been almost exclusively worshipped in India,—that of the *Linga* or *Phallus* : neither is there the slightest hint of another important feature of later Hinduism, the *Trimurtti*, or Tri-une combination of

Brahma, Vishnu, and Siva, as typified by the mystic syllable *Om*, although according to high authority on the religions of antiquity, the *Trimurtti* was the first element in the faith of the Hindus and the second was the *Lingam*." (1) Vishnu appears in the hymns as one of the minor divinities—a manifestation of the sun-god and the useful friend of Indra. (2) The idea of his incarnations which occupies so large a portion of the latter-day creed is entirely absent in the *Veda* proper. His three steps—*Tri-vikrama*—are identified with "the different positions of the sun at his rising, his culmination and his setting," (3) and in the same connection commentators explain *Vishnupada* to mean the meridian sky and *Gayasira* the hill of setting. (4) In the *Satapatha Brahmana*, Vishnu is said to have been a dwarf, (5) and it is only in the epic poems that we can find the dwarf combined with the three steps to build up the present story of the *Vamana Avatara* or Dwarf incarnation of Vishnu. *Gayasirsha* and *Vishnu-pada* have become the subjects of a separate legend sanctifying Gaya as a place of pilgrimage for the performance of *sraddhas*, for the benefit of the souls of deceased ancestors. Amongst others

(1) Wilson's Rig Veda, Vol. I., pp. XXVI-XXVII.
(2) Muir's Texts, Vol. IV., pp. 68, 78, 86, 91.
(3) Muir's Texts, Vol. IV., p. 66.
(4) Muir's Texts, Vol. IV., p. 65.
(5) Muir's Texts, Vol. IV., p. 123.

this legend is given in the Gaya Mahatmya portion of the *Vayu Purana.* (1)

In the Rig Veda, 1, 61, 7, it is said that "*Vishnuh...:.....vidhyad varaham.*" (2) Vishnu pierced the *Varaha*, and Wilson in his translation makes this mean that Indra, the pervader of the universe, pierced the cloud, *Varaha* being one of the recognised synonyms for *megha* in Vedic lexicography. Dr. Muir, however, translates the passage to mean that Vishnu pierced the boar (3). I think that the meaning given by Wilson is the earlier and the truer meaning, although in the later hymn (Rig Veda, VIII, 66, 10), I accept Dr Muir's rendering of *Varaha* by a hog. "The wide-striding Vishnu, urged by thee, O Indra, carried off all [these things],—a hundred buffaloes, broth cooked with milk, and a hog *Emusha.*" Muir, with some hesitation, renders the last word as "fierce", and most likely he is right (4). In the *Satapatha Brahmana*, however, the legend has so far decayed that it is said "formerly this earth was only so large, as of the size of a span. *Emusha*, a boar, raised her up." (5) In the *Taittiriya Brahmana*, this boar (*Varaha*) is identified with Prajapati and even in the *Ramayana* the legend is

(1) Shabdakalpadruma, Vol. II., pp. 970-2.
(2) Reg Veda, Vol. I., p. 163.
(3) Muir's Texts, Vol. IV., p. 67.
(4) Muir's Texts, Vol. IV., p. 91.
(5) Muir's Texts, Vol. IV., pp. 27-28.

continued in that form (1), the boar being described as a manifestation of Brahma and not of Vishnu, and it is only in later times that we hear of the boar-incarnation of Vishnu. Krishna, Devakiputra, the son of Devaki, is mentioned in the *Chhandogya Upanishad* not as an incarnation of Vishnu, but only as a scholar eager after the pursuit of knowledge and belonging perhaps to the military caste (2). And as for *Kali*, the *Mundakopanishad* describes her, along with *Karali*, as one of the seven tongues of fire, and not as a separate and powerful divinity.

"The forms of worship prevailing in the Vedic age were also widely different from that prevailing at present under popular practice. The worship which the hymns describe (3) "comprehends offerings, prayer, and praise ; the former are chiefly oblations and libations,—clarified butter poured on fire, and the expressed and fermented juice of the soma plant, presented in ladles to the deities invoked, in what manner does not exactly appear, although it seems to have been sometimes sprinkled on the fire, sometimes on the ground, or rather on the *kusa*, or sacred grass, strewed on the floor, and in all cases the residue was drunk by the assistants. The ceremony takes place in the dwelling of the worship-

(1) Muir's Texts, Vol. I, pp. 53-53.
(2) Weber's History of Indian Literature, p. 71, Muir's Sanskrit Texts, Vol. IV, p. 183.
(3) Wilson's Rig Veda, Vol. I, XXIII, XXIV.

per, in a chamber appropriated to the purpose and probably to the maintenance of a perpetual fire, although the frequent allusions to the occasional kindling of the sacred flame are rather at variance with this practice. There is no mention of any temple, or place of worship, and it is clear that the worship was purely domestic. The worshipper, or *Yajamana*, does not appear to have taken of necessity, any part personally in the ceremony, and there is a goodly array of officiating priests,—in some instances seven, in some sixteen by whom the different ceremonial rites are performed, and by whom the mantras, or prayers, or hymns are recited. That animal victims were offered on particular occasions, may be inferred from brief and obscure allusions in the hymns of the first book, and it is inferrible from some passages that human sacrifices were not unknown, although infrequent and sometimes typical; but these are the exceptions, and the habitual offerings may be regarded as consisting of clarified butter and the juice of the Soma plant."

"Although the Vedic worship of fire and of the elements was in its origin patriarchal and domestic, there is evidence in the hymns themselves of a later tendency to establish an elaborate priestly organisation (1). It is remarked by Eggeling in the Introduction to his

(1) Wilson's Rig Veda, Vol. II., Introduction, p. 1.

translation of the *Satapatha Brahmana*, that, "from clear indications in not a few hymns of the Rig Veda, it appears that a distribution of the sacrificial functions among different classes of priests had taken place before the final redaction of that collection (1). The fire-god nevertheless, did not require a temple to be built for him (2). The ordinary daily sacrifices were performed in the house, and from their simple character required not the assistance of a ministering priest. The fire was accommodated in a separate shed attached to the residence of the worshipper. Even in the case of the greater sacrifices instituted by rich and powerful individuals temporary constructions sufficed for the *Yajnasala* or the Hall of Sacrifice (3). The state of society in the Vedic period was partly pastoral and partly agricultural. Villages (*grama*) are mentioned several times in the hymns, and in one place it is said that Indra demolished a hundred cities of stone, an expression which could hardly have been used even for a mythological purpose, unless the Rishi had some knowledge of stone structures and before his mental if not his actual vision prototypes in stone-built cities on the earth. In other places iron cities or fortifications and cities with a hundred enclosures or fortifications

(1) Muller's Sadred Books of the East, Vol. XII., p. 15.
(2) Muller's A. S. L., p. 204.
(3) Muir's Texts, Vol. V., p. 451.

are mentioned, doubtless in mythological or figurative senses, but nevertheless the use of such mythologies or figures of speech suggests the idea of forts or fortified cities as actually existing in the country at that time. Bricks (*ishtaka*) are frequently mentioned in the *Brahmanas* as used for the construction of vedis or altars, but it does not clearly appear whether they were baked or not. Altogether there cannot be any doubt that the Vedic people were quite competent to erect temples, but they did not raise them because of the peculiar nature of their worship at that time which did not then require such edifices.

"Closely connected with the question of temples is the question whether the Vedic Indians made images of their gods? MaxMuller answers firmly in the negative. "The religion of the Veda," says he, "knows of no idols. The worship of idols in India is a secondary formation, a later degradation of the more primitive worship of ideal gods (1)." On the other hand Dr. Bollensen (2), on the authority of texts, some of them given in the fifth volume of Muir's Sanskrit Texts, is of opinion that the hymns contain clear references to images of the gods, and Muir himself leaves the question open, preferring to hear what the other side have to say to Dr. Bollensen's specific authorities. It is

(1) Chips from a German Workship, Vol I., p. 38.
(2) Muir's Texts, Vol. V., p. 453.

not necessary here to enter into any detailed examination of these texts, but it will be sufficient to say that they do not necessarily and irresistibly lead to the desired conclusion, but are quite susceptible of a meaning quite in harmony with the traditions of oriental commentators and with the opinion deliberately expressed by so eminent an authority on the Vedas as MaxMuller. The gods are described in the hymns with many human attributes—a necessity of the human mind and language, but it does not necessarily follow therefrom that images of those gods clothed in such human attributes were artificially prepared and worshipped. Dr. Bollensen argues from the fact of the Vedic gods being called *divo naras*, "men of the sky," or *nripesas*, "having the form of men," that the Indians did not merely in imagination assign human forms to their gods, but also represented them in a sensible manner. I confess my inability to follow the latter part of the argument." (1).

As an additional reason—and to my mind one that is sufficient to turn the scale against Dr. Bollensen—I would mention that the ancient Persians had no images of the gods Mittra, Varuna and others, who were Gods common to them and the Hindus before they parted company. They worshipped the fire as do their descendants, the modern Parsis. They worshipped

(1) 'The Hindu Law of Endowments,' by P. N. Saraswati, pp. 30-37.

other Gods but the sacrifices were through the fire, and so it was with the ancient Hindus. During the time of the Ramayana also, we do not find any mention of images but the great prevalence of Agnihotra is in many places indicated. One of the earliest disciples of Buddha was Kasyapa. He lived at Gaya on the banks of the Niranjana, surrounded by many Brahman disciples. He was a worshipper of fire. When he became a disciple of Buddha, he threw away the utensils for the worship of fire and not images of Gods, into the river and which when carried down by the stream gave to an astonished people the first indication of the power of the new religion. It is probable that Buddhism supplanted fire worship in this country. According to the Puranas, it abolished the sacrifice of animals in Yajnas. When, however, pure Buddhism gave way to Tantrika Buddhism, Gods and Goddesses began to be generally worshipped. There is no mention in Vedic literature of the later Hindu idea that a man could by merit become an Indra or a Shiva or the Supreme Being himself. Worship of the forces of nature, as was the worship of the ancient Aryans, was not consistent with the worship of Gods with forms. But we know that long before Buddha's time, the tempting God and beautiful female Goddesses, who tempt men into pleasant delusions, had come to be believed.

Brahma and Indra had human forms. It is probable that images of Gods and temples for Gods began to be established before Buddha's time but long after the vedic period. When the people were engaged in the performance of Yajnas and Satras, the necessity for the setting up of temples and images was not felt. But the belief in the existence of the various Gods must have led to the setting up of images and temples to them in course of time, as the worship of the fire became less popular. Brahmins alone could be Agnihotris. When the other castes became influential, they wanted Gods for their worship. The wane of the influence of the Brahmin and the unpopularity of the worship of fire led to the worship of images which might have been borrowed from the aboriginal tribes and from the foreign invaders of India in ancient times. The setting up of images of Buddha and the Bodhisatwas and of Chaityas and Stupas also, probably, made the setting up of images of Hindu Gods and Hindu temples more general, in imitation of the Buddhists.

Images and temples may have been unknown in Vedic times but charity was inculcated and practised to an extent probably greater than in later times. Gifts to officiating priests in the Yajnas or on particular occasions very often consisted of thousands of cattle, gold, and sometimes of beautiful daughters given in marriage.

Nothing was too good for a priest. Then again the entertainment of guests was considered an urgent and indispensable duty. The performance of five Yajnas or sacrifices was an indispensable duty of a householder.*

Then again we find that the support of the helpless and the infirm were considered a pious duty. In the Chhandogya Upanishad, we find the mention of the maintenance of guest-houses by charitable persons. Charity was thus a distinguishing characteristic of the ancient Hindu.

In the Vedas, the Smritis and the Puranas, we find the words *Ishta*, *Purtta* and *Yogakshema*. There is some dispute as to the meaning of the words. *Ishta* means a sacrificial act which is the cause of getting good that has not been got, and *Purtta* is an act of charity like the digging of tank which is the cause of preserving the good that has been got. There is a great difference of opinion as to the meaning of the word *Yogakshema*. But we may safely accept the meaning as enunciated in an ancient text of the Rishi Laugakshi cited in the Chandrika, which says *Kshema* means *Purtta*, and *Yoga* means *Ishta*: चेमंपूर्त्तंयोगमिष्टमित्याहुस्तत्त्वदर्शिनः। Ishta

* स्वाध्यायेनार्चयेनर्षीन होमैर्देवान यथाविधि।
पितॄन् श्राद्धैश्च नृनन्नैर्भूतानि बलिकर्मणा॥

Let him worship according to the rule, the sages by the recitation of the Vedas, the gods by burnt oblations, the manes by funeral offerings, men by gifts of food, and all living creatures by offerings of food, Manu III, 81.

means and includes Agnihotra, vaidic sacrifices, Pashubandh, Chaturmashya, Agnistoma, gifts offered to priests at sacrifices, religious austerity, piety, Vaiswadeva sacrifices and Atithya.*

Purtta works are gifts and charity according to the Smarta and not Vedic rites. Manu says, they are gifts made outside the sacrificial ground. They mean and include the following, according to the texts: gifts made during eclipses and other days auspicious for such acts, tanks, groves, processions for the gods, wells, temples, rest-houses, giving of food and relief of the sick. Gifts for educational purposes, though strictly not coming within the defunction of Purtta, have been extolled in the Smritis and Puranas as of high merit. Devala defines Dana or gift in charity as the making over of a property with a pious mind, according to the rules of the Shastras. It is divided into four classes: (1) Dhruba or eternal, such as *Prapa* or the construction of places of supplying water or of *Aramas* or rest-houses and the like, (2) Ajasrika or daily charity, (3) Kamya or gifts made with some particular object, and

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* इष्टिभिः पशुबन्धैश्च चातुर्मास्यैर्यजेत्तु यः।
अग्निष्टोमादिभिः यज्ञैः यजेत च स इष्टवान्॥
अग्निहोत्रं तपः सत्यं वेदानां चैव पालनं।
आतिथ्यं वैश्वदेवं च इष्टमित्यभिधीयते॥

Text of Sankha cited by Hemadri.

(4) Naimittika or occasional made at an auspicious time, on the occasion of some ceremony (1)

In England endowments originally meant, as mentioned by Sir Henry Maine, the settling of property for the use of the church (Statute 15, Richard II., Ch. 6 and 4 Henry, IV., Ch. 12). The meaning was gradually extended to trusts for charity. Charitable objects include according 45 Elizabeth, 4, the relief of the aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities, the repair of bridges, ports, havens, causeways, churches, sea banks and buoys, the education and preferment of orphans; relief, stock or maintenance for houses of correction; marriages of poor maids, support, aid or help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes."

In Morice *v.* Bishop of Durham, the Master of Rolls Grant, L. J. said the word charity "in its widest sense denotes all the good affections men ought to bear towards each other, in its most restricted sense relief of the poor. In neither of these senses it is employed in

(1) Hemadri Manakahanda, p. 16.
Maine's Early History.

this Court. Here its signification is chiefly derived from the Statute of Elizabeth. Those purposes are charitable which the Statute enumerates, or which by analogies are deemed within its spirit and intent and to some such purpose every bequest to charity generally shall be applied."*

Charity was great in ancient India. Some of the emperors used to perform a Yajna called the Visvajit in which every thing they possessed except the kingdom, in which according to Hindu jurists they had no personal interest, had to be given away in charity. We thus find Raghu, whose conquests it is said extended to Persia on the west and China on the east, gave in charity all he possessed and kept for himself only earthen vessels for drinking water. The custom did not fall into disuse till rather recent times. We find Hiuen Tsan describing such a ceremony by king Harsha at Prayaga or Allahabad at the confluence of the Ganges and the Jumna. Since that time there have been no such powerful monarchs and no authentic history and we have no account of any such ceremony. But we find charity still practised on a large scale. The last powerful King of Bengal, Ballala Sena, wrote a book called the Danasagara. A ceremony called the Tula in which the donor

* 9 Ves. p. 405. See 16 V. 17 Vic. C. 137. See 66, 18 and 19 Vic. C. 124, Sec. 48.

weighed himself in a scale against gold and other precious metals and distributed them among Brahmans, was very often practised in medieval India. We find Chandeswara, the great minister of the King of Mithila, the conqueror of Nepal and the author of the Vivada Ratnakara, describing with pride, in the beginning of his work, the ceremony as performed by him.

Under the Hindu law, we have seen that, Ishta and Purtta works and gifts for imparting learning are considered of merit. Dana is defined as merely gift. Many of the various objects of charity especially, public charity now known as such, were in ancient times and under conditions of society in those times, practically unknown. But with extended ideas of charity under conditions of modern society at least in India, the most extended meaning may be given to the word. It may mean all that tends not only to the good of men, as Grant M. R. says but also all acts which is calculated to give relief to the sufferings of dumb creatures. There is no reason why our Courts should be guided by any restricted technical meanings given by English decisions.

It is only from the time of Buddha, that we find mention of temples, monasteries, hospitals and of endowments for religious and charitable purposes. The acts of beneficence of Buddhists towards men as well as beasts

were many and great. We find mention of hospitals for men and beasts described by Fa Hien, in the ancient city of Pataliputra, which is modern Patna. Such foundations were then unknown in other countries. The Indians were also very anxious to build temples, chaityas, stupas, monasteries and colleges and to make permanent provision from them. There do not seem to have been any temples of Buddha during his lifetime. But after his death, temples with his images became general. When Tántrika Buddhism got hold of the Indian mind, temples to the many Bodhisatwas and past and future Buddhas began to be erected and also to female goddesses who were associated with the Bodhisatwas. This Tantrikism among Buddhists and Hindus was the cause of the general worship of the images of the gods and goddesses and village spirits, of spirits presiding over every disease, tree and stone and serpent which we now find in India. Tantrikism fused Buddhism, Vaishnavism and Sivaism into one religion for the worship of a male deity conjoint with a female deity. The worship of the female principle called Prakriti which is sometimes translated as nature, came into vogue at some time between the 5th and 6th century. The Debi Bhagabata Purana remarkable for its attempt to make out that all gods are parts of the male principle and the goddesses are parts of the female principle, was composed about

this time. However that may be, it seems pretty certain that Tantrikism, Buddhist and Hindu, was the cause of the general worship of images and temples, though as we have seen before they came into existence in more ancient times.

With the establishment of images and temples, dedications of land for their maintenance became necessary. Not only were lands dedicated but slave women were also attached to many ancient temples showing the spirit which led to image worship in India. Every temple, even now, is supposed to have its dancing hall or Nata Mandir. All this is besides the scope of our present enquiry. Sufficient for us to know is that in dedication for Gods meant dedications for the maintenance of the worshipping Brahmins, who because they so worshipped were called Devalas and were all but out-castes among Brahmins, a fact showing the not very reputable origin and character of such worship and worshippers, the maintenance of servants, female slaves, dancing girls, and muscians and providing for the articles of worship. This should be clearly understood as questions very often arise as to the objects for which the income of temples may be expended and the history of temples and their constitution not being generally known, there is very often much groping in the dark and ingenious arguments not based on facts.

Endowments are either public or private. These again are either for religious or charitable purposes. These are the four great divisions of charity. In a public endowment, the dedication is to or for the use or the benefit of the public. When property is set apart for the worship of a family God, in which the public are not interested it is called private Debutter. It is very often a question of great difficulty whether a Debutter is private or public. Whenever the worship of a household God is thrown open to the public, it is difficult to say that it is not a public Debutter. But it may be thrown open in a way such as to exclude the idea of its being a public charity. All Mutts, Pagodas and the like institutions are considered as public Debutters. But in the case of Vaisnavite Akharas, Gosavi Mutts or in Shivite Mutts, where the Mohants are married men and their children succeed to their posts, it becomes sometimes difficult to say whether they are public Debutter or not. The presumption in all cases is that all such Debutter is public Debutter.

We have already seen that there may be private Debutter and public Debutter. But according to the Bombay High Court, unlike the English Law with respect to charities, Hindu Lawgivers made no distinction between a religious endowment having for its object the worship of a household idol and one which is for the benefit of the

public.* The Calcutta High Court have however made a distinction between public and private Debutter.

The Bombay High Court have also held that a trust for a Hindu idol and temple to a certain class of men is a trust for public charitable purposes (1). They wholly repudiate the claim of Shevaks of temples to the offerings as their property and make the following observations about them which are relevant as showing the character of public and private endowments and public endowments under the charge of Shevaks: "There is no difficulty in conceiving the existence of a society having property and receiving gifts from its own members or from strangers, which it then disposes of simply for its own benefit or at its discretion. The guilds and companies in manufacturing and trading cities held and still hold estates without the attendant obligation of a charitable trust. The property is their own and distributable amongst members or at the pleasure of the governing body of the society, not held for the benefit of any class outside the society, or for the promotion of any purpose of recognised public utility. The latter characteristic is essential to a public charity but in its absence there may be corporations existing by royal grant, prescription or legal allowance,

* Rupa Jagshet *v.* Krishnaji Gobind, 9 Bom. 169.
(1) Manohar Ganesh *v.* Laksheeram 12, Bom. 247.

holding property for other than charitable purposes. Whether the association exists for charitable purposes or not, it cannot according to English law, without incorporation in some sense become vested with property as a mere fluctuating and undefined aggregate—Goodman *v.* Mayor of Saltash (2). If its purposes are such as are contemplated by Sec. 26 of the Indian Joint Stock Companies' Act VI. of 1882, the society may get itself constituted accordingly under the Act. Otherwise though the individual members may have certain rights and privileges as members of a class or answering to a certain designation, those advantages must be realized as against the world at large through the proprietary or quasi-proprietary right of some other person or corporation."

The Judges then say that these persons cannot be considered as holding property and that under Hindu Law, the idol is an entity which can hold and does hold property. It is through the idol that these persons enjoy their rights and privileges and they cannot be allowed to revel on the growing revenues of the temple and "are bound to widen the range of the deity's beneficience in proportion to the expansion of his mundane means."

Properties of Hindu religious establishments, such as Mutts, Akharus and the like, are endowments with contain peculiar characteristics which will be fully dealt with in Lecture X.

(2) L. R. 7 App. Case 648.

LECTURE VII.

Power of Creating Endowments.

You find that at the present day, a Hindu of Bengal has full power of disposing his property by way of gift or testamentary devise. But at the beginning of the nineteenth century, this power was very far from being well established. It is clear from the texts of the Rishis that a Hindu had no power to alienate immoveable property. Immoveable property whether joint or separate was inalienable because members of the family "born as well as those yet unborn required maintenance."(1) But this good old rule was found inconvenient in more modern times. The Commentators laid down that the rule did not apply to the case of separated members of a family. In the case of a joint family, they cite the text of an unknown author to the effect that the managing member or any member of a family can make a mortgage, sale or gift of a joint immoveable property, during a time of distress, for the support of the family and for religious

(1) ये जाता येऽप्यजाता ये च गर्भे व्यवस्थिताः ।
वृत्तिं च तेऽभिकांक्षन्ति न दानं न च विक्रयम् ॥
A text of Vyasa cited by the Commentators.

purposes. This power of alienation for religious purposes was invented at a time when the power of the priesthood was supreme. Ancient texts say that the gift of land was a bad gift. But later texts say that gift of land to Brahmans was the best of gifts.

The Mitakshara in interpreting the words 'religious purposes' says that they mean indispensable duties like the Sradh of the father. However that may be, the power of making endowments, though unknown in ancient times was established in more modern times. Even then, it was thought that the gift of one's whole property to an idol was invalid. The history of the law here is analogous to the history of the law of England about endowments. We are reminded of the statute preventing alienation for superstitious uses, when we read of the text prohibiting alienation of one's entire wealth. In European countries, as in India, it was thought that the sins of a lifetime could be wiped off by gifts made on death-bed to Brahmans and gods. The abuse was so great as to call for legislation by the Rishis for preventing it.

On the authority of the texts of Yagnavalkya, Katyayana and Daksha, and another Rishis (1) which made the gift of one's entire property

(1) विक्रयश्चैव दानञ्च न देया: स्युर्वनिच्छव: ।
दारा: सुताश्चसर्व्वस्वमात्मन्येव तु योजयेत् ॥
Katyayana cited by the Commentators.

Adeya or incapable of being the subject of gift, it was at first thought in Bengal that the gift of one's whole property to an idol was invalid, but the validity of such gifts was soon established. (1)

It was laid down in the Smritis that a gift made in disease or distress is invalid except when made for religious proposes. Here again religious purposes should be understood in the sense in which Vijaneswara understood it. The Vivada Chintamani says that it refers only to donation for the performance of virtuous deeds. But it has now come to be settled that such a gift is valid. But it would be absurd to hold that a gift made when a person is so ill as to be unable to understand the effect of his action or under duress, undue influence or fraud would be valid. Vrihaspati lay down that "what has been given by one angry or resenting an injury, through inadvertence, or by one distressed, by a minor, a mad-man, one intoxicated or terrified, cast from society, or affected with disease or grief, or what is given in jest; all such gifts are

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स्वं कुटुम्बाविरोधेन दद्यं दाद्यासुताद्दते ।
नान्वये सति सर्व्वस्वं यद्यान्यस्मै प्रतिश्रुतम् ॥

Yajnavalkya, 2—175.

अन्वाहितश्च निक्षेपः सर्व्वस्वञ्चान्वये सति ।
आपत्स्वपि न देयानि नववस्तूनि पण्डितैः ॥

Daksha cited by the Commentators.

(1) Gocool Chunder Carforma's case F. Macnoghten 320. App. 58, Radhaballabh Tagore *v.* Gopee Mohen Tagore. F. Macnoghten 335.

void."(1) It would come under the Transfer of Poperty Act, section 126. Again you may have heard of a principle considered in our Courts as a principle of Hindu Law, though it is not based on any authentic text but only on the dictum of Jagannath, that a gift without delivery of possession is not valid. But in case of a gift to an idol such a gift has been held to be valid. A devise or a gift in favour of an individual may be bad but may be good when in favour of an idol. (2)

In the case of widows also, it was held that she had authority of disposing of a small portion of the property wanted by her from the husband for religious purposes. The widow has the power of performing all religious or charitable acts. But such acts do not always constitute valid necessity. The Allahabad High Court and the Madras High Court have by a series of rulings held that the gift of a small portion of the property for such purposes is valid (3). In Bengal also, it was held in certain old cases on the authority of the Mitakshara and the Bengal

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(1) क्रुद्ध क्रुष्ट प्रमत्तार्त्तबालोन्मत्तभयातुरैः ।
मत्तातिवृद्धनिर्धूतैः सम्यङ्नृशोकि रोगिभिः ॥
नर्म्मदत्तं तथैतैर्यद्दत्तं तत् प्रकीर्त्तितम् ।
Vrihaspati, 25 Ch, 9-10.

(2) Gnanasambanda *v.* Velu, 27 I. A. 69, 23 Mad. 271.

(3) Lakshminaranya *v.* Das, 11 Mad. 288. Rama *v.* Ranga, 8 Mad. 582. Puran Bai *v.* Jainarayan, 4 All. 482. Collector of Maslipatam *v.* Savalo Vencata, 8 Mad. 482.

Commentators, that the widow had absolute power to alienate for religious purposes a portion of the property. (1) But in the latest case on the question, the Calcutta High Court have held that for religious or charitable purposes which were for the widow's own spiritual welfare, she has no power and an alienation can be upheld only "when it related to a very small piece of land and was for an indispensable religious necessity and not for the spiritual welfare of the widow but for that of her husband."(2) The creation of an endowment for an idol was held in that case to be beyond the competence of a widow. The gift in that particular case was of a small piece of land to the Pujari of an idol set up by the mother-in-law for the due performance of the Sheba.

We next come the power of making endowments by way of will. It is undoubtedly true as Mr. Mayne says "that the idea of a will is wholly unknown to Hindu law." It is rather beside the scope of these lectures to trace the very interesting history of the Law of Wills in this country. But you should know that the power of making wills among Hindus is supposed to be based on three texts of Katyayana

(1) Jugjeevun Nuthooju *v.* Deosunker Kasseeram, Borradaile's Report, Edition of 1862, p. 436. Kupoor Bhawanee *v.* Sevakram Sheosanker Borr., p. 448.

(2) Ram Kamal Sing *v.* Ramkrishno, 22 Cal. 506. Kartick Chunder *v.* Gour Mohan Roy, 1 W. R. 48.

and Harita cited by Judges and text-writers. Those texts only speak of promises for religious or other purposes made by a father which the son must fulfil after his death. Upon this slender basis of the obligation of the son to fulfil the father's promise for religious purposes the present complicated law of wills is founded.

In Bengal, under the Dayabhaga school, even when the power of making wills was established, it was thought that such power was of a limited nature. It was only in 1831 that in the case of Juggomohen *v.* Nemoo Dassee(1), the question was finally settled by the Supreme Court by a decision which was based on the following certificate of the Sudder Dewany Adalut : "On mature consideration of the points referred to us, we are unanimously of opinion that the only doctrine that can be held by the Sudder Dewany Adalut consonantly with the decisions of Court and the customs and usages of the people is that a Hindu who has sons can sell, give or pledge without their consent immoveable ancestral property, situated within the province of Bengal; and that without the consent of the sons, he can by will prevent, alter or affect this succession to such property." So under the Bengal school a man has full power of disposition over both ancestral and self-acquired property. Under the Mitakshara school in Bengal and in the other

(1) Morton 90.

provinces, the history of wills is even more chequered than under the Dayabhga school, but it is now quite settled that a Hindu can dispose of his separate property by will. It is equally settled that as regards joint family property, a member of a joint Hindu family has no power of disposing it by will.

The Mitakshara, citing a text about the power of one member to make an alienation, says: "The meaning of the text is this: while the sons and grandsons are minors and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one member who is capable may conclude a gift, hypothecation or sale of immoveable property if a calamity affecting the whole family require it, or the support of the family render it necessary for indespensable duties such as the obsequies of the father or the like make it unavoidable." (Mitakshara Ch. 1, Sec. 1.29.) It was upon the authority of this passage that it was held in an old case in Bengal that the father could make the gift of a small portion of the family property for religious purposes (1). A more recent case of the Allahabad High Court has established the same principle. To the historical student of Hindu Law, it will appear clear that the powers of a Hindu father were

(1) Golap Chand Pande *v.* Babu Kunwar Sing, 5 Select Report S.D.A, New Ed. 29, followed in Muddun Gopal *v.* Rumbuksh,6 W.R. 7.

much greater in moveables in ancient times than now. But as regards immoveable property, it is difficult to go beyond the limited rule laid down by the Mitakshara. I shall certainly not contend that a modification of the old rule as laid down by the above cases under present circumstances is not advisable. But it should be extended to the case of other unseparated members also, for the text or the rule of the Mitakshara makes no distinction between the father and the other members.

You all know what are superstitious uses and Mortmain Acts. The clergy exercised at a time in England, a very undesirable influence over the minds of the people. Instances of gifts of land to the church on death-bed were frequent and numerous. So great was the evil that the Legislature thought fit to pass successive Statutes of Mortmain (Ed. I. Cap. 2 of 1279, 23 Henry VIII Cap. 10, 9 Goe. II. Cap. 36) which imposed various conditions and restrictions on alienations for religious or charitable purposes (Stephen Comment, Vol. 1, pp. 455-467). The ingenuity of lawyers was exercised to devise means to evade these Acts. The law of trusts had its origin in this struggle for evading the law. But the Acts though their effect was nullified to a certain extent, still exercised a beneficial influence and are still law. By Vict. C. 27 *v.* 31 and 32 Vict. C. 44

(1) Raghunath Prosad *v.* Gobind Prosad, 8 All. 76.

and 34 Vic. C. 31 various trusts for religious and charitable purposes have been exempted from the Mortmain Acts. The law about superstitious uses and the Statutes of Mortmain have been held to be inapplicable to India (1). But the ancient Rishis were aware of the evil of the influence of priests on dying persons and ordained that there may be some chance of salvation for one who steals Brahmin's property but none whatsoever for one who takes gifts from a person sorely afflicted with disease (2). The Succession Act lays down the following rule about the matter "No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some places provided by law for the safe custody of the wills of living persons." (Section 105). The section is not applicable to Hindus. Probably it was thought that these safe guards were not necessary in the case of Hindus or would be resented by them as transgressing Hindu Law.

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(1) Mayor of Lyons *v.* The East India Company, Moore 175.

(2) बहुशो द्विजवित्तानामपि स्वेयं तरिष्यति।
आतुराद्यङ्गहीतन्तु तत्कथं निस्तरिष्यति।
Brahma Purana cited in the Hemadri, Vol. I, p. 58.

LECTURE VIII.

Endowments—How Created.

In early times in India, we have no mention of endowments. We have Yagas or sacrifices. The Mimansa says that a Yaga is the parting with a thing that it may belong to a deity (4-4-12). During the Vedic times, offerings made to the various deities were placed on the fire. This practice does not seem to have been confined to the Aryan nations, among whom the worship of the fire was a common household ceremony, but also among some Scemitic races. Those stalwart unitarians, the Jews, also had burnt offerings. The Rig Veda speaks of the fire as "carrying the homa articles after making them fragrant to the gods" (10 M. 15, S. 12). Fire was thus the original trustee of all Debutter. When this once universal practice of the worship of the fire fell into disuse and images of deities came into vogue, the permanence of their daily worship became an object which had to be secured by those who set them up. It was necessary to preserve the property dedicated and not to throw it into the fire and endowments

had to be created. But originally there were no trust deeds.

In Rome in pre-Christian ages, dedications were made by placing a gift on the altar of a God without the intervention of a trust and the offering became Extra Commercium.* In early Christian times, a gift placed as it was expressed "on the altar of God" sufficed to convey to the Church even lands so dedicated.

When Christianity became the state religion of the empire, dedications were made for particular churches, monasteries, hospitals &c. The officials of the church were specially empowered to watch over the administration of the funds and estates thus dedicated to pious uses, but the immediate beneficiary was conceived as a personified realization of the church, hospital &c.

In ancient Hindu society, when there were no regular trusts or trust deeds, in case of the setting up of an idol, gifts of lands were usually made to priests and other persons, who were necessary for carrying on the worship. There were sometimes deeds executed, but usually gifts were made with libations of water. We have very few copperplate inscriptions or Sashanas showing how endowments were made in ancient times. The ceremonies of Sankalpa and Pratista had to be performed for the

* W. and B. Hindu's Law 185. Ulpian Fr. XXII. 56. Sav Sysl Sec. 88.

setting up of the idol and the temple. The ceremony according to the Grihya Parisista, Hayasirsha Panchatantra, the Matsya Purana and the Vrihat Sanhita, required an Acharya or a learned priest for the worship of the God, four Japakas or mutterers of mantras for the door and one for the *garbha* or the inner temple. The Grihya Parisista speaks of the appointment of a Murtidhar or image-bearer, and the Malaya Purana recommends the appointment of 32, 16 or 8 Murtippas or image-bearers, 8 or 4 Dwarapalas or gate-keepers. From very ancient times we have mention of songs and dances in connection with temples. Indeed in all ancient temples in historical times there was a dancing hall and dancing girls were attached to them. There were also other *paricharakas* or *shevakas*, who had to perform various offices in the temple and for the worship of the idol. The practice was to give lands to all these persons inheritable by their children, for carrying on the duties in connection with the worship of the idol and the maintenance of the temple. As regards mere household idols also, grants had to be made to the priests for their worship. It was usual to make a grant of land to the officiating priest for the supply of offerings for the daily worship of the deity making it Debutter. In the case of large Zemindars, who maintained great temples, a grant was made

from the revenues for the worship of the idol but there was no trust. That in the case of household idols also, as a rule, there was no trust. The head of the family had to supply the articles of worship, and in millions of Hindu families the worship of the gods is daily carried on without a trust. Indeed the idea of the *shebait* and the trustee is a modern one.

We next come to endowments in favour of religious institutions. From very ancient times a ceremony called the Chaturmashya has been in vogue among Hindus. The Sanyasis of pre-Buddha times had also a custom of staying in some place of shelter during the rainy season, but we have no record of any residence built for them. It was during the latter part of the life of Buddha that regular monasteries began to be built. The history of such monasteries is thus described in the Encyclopidia of Indo-Aryan Research by De H. Kern.

"On the residence of monks the sacred tradition affords much, apparently trustworthy information. We are told that the retreat during the rainy season, the Vassavasa or Vassa, (Shr Varsika, Varsopanayika) was instituted in imitation of the same institution with the *tulera-don* sects. During that time the monks are forbidden to travel, and have to arrange for themselves places to live in. There are two periods for entering upon Vassa, Varsapanayika,

a longer and a shorter one, the former beginning at full moon of Asadha; the latter one month later, both ending with the full moon of Kartika. With the Northern Buddhists, the usual period of retreat was three months, from the first of Sravan to the first of Kartika.

It is not clear, where in the first time of the order, the brethren, apart from the hermits, had their abodes, either during the retreat or during the other part of the year. It was not necessary that a great number of them lived in the same place, for the half monthly recital of the Pratimoksa did not require an assembly of more than four persons. Now-a-days it is customary in Ceylon that the monks during the retreat leave their monasteries and live in temporary huts. But how to reconcile this with the following statement of Buddhaghosa 3. "They are to look after their Vihara, to provide food and water for themselves, to fulfil all due ceremonies, such as paying reverence to sacred shrines, etc., and to say loudly once, or twice, or thrice, "I enter upon Vassa in this Vihara for these three months." And besides, the avowed object of the institution is to keep the monks from roaming about. Therefore, we arrive at the conclusion that the tenor of the regulation comes to this, that during the rains the monks must stay in a monastery or any other fixed abode, in other seasons they may do so.

In the beginning, as the tale goes, the monks had no fixed abodes, Sayanasana, Pali Senasana. They dwelt in the woods, at the foot of a tree, on a hill, in a grotto, in a mountain cave, a cemetry, a forest, the open air, on a heap of straw. Now a rich merchant of Rajagriha wished to erect dwellings for the reverences, and the Lord Buddha gave his assent saying, "I allow you, O monks, abodes (layana, lena) of five kinds: Viharas, Addhayogas, towers (Prasadas, Pasadas), stone houses with a flat roof (Hormyas, Hanumiyas) and crypts." On hearing from the monks that the Lord had given his assent, the merchant had in one day finished 60 dwelling places. The Lord gave thanks to him by the same stanzas as were uttered by him on accepting the gift of the Jetavana, a circumstance which points to some confusion in the tradition.

The very absurdity of the story is interesting, because we may gather from it that edifices as above specified were in possession of the Sangha when the Mahavagga and the Kullavagga were composed.

The term Vihara does not only denote a monastery, but frequently a temple, a striking instance of which is afforded by a passage in Huen Thsang's travels, and it is quite so, too, in Ceylon where the word is more generally applied to the place, where worship is conducted, whilst the dwelling of a monk is called a Pannea-

sala. The most unambiguous, if not the most common term for a monastery is Sangharama. Undoubtedly every great monastery had a Vihara or temple annexed to it. We know this with certainty of Nalanda, and Sarnath near Benares."

The modern Mutts were all founded on the pattern of Buddhist monasteries. The first Mutts were founded by Sankaracharya. Gifts of land and money were made to those monasteries by princes and other wealthy persons. The gifts were made to the head of the establishment, Mohunt or Adhicary, without any express words of trust. The gift of Jetavana and the Vehara of Rajagriha mentioned above made to and accepted by Buddha were probably the first endowments in India. Later on Mutts were founded in the following manner. An itenerant Sanyasi by his reputation for sanctity would get a following and obtain gifts from wealthy persons and establish a monastery himself with a number of chelas. In course of time property would be accumulated and a number of chelas procured, making a large Mutt. Most of the Mutts now existing were founded in this way. But instances are not rare in which Sanyasis by their acuteness acquired wealth by trading or agriculture or money-lending and established monasteries. Endowments in respect of all these establishments were made by making gifts to the Mohunt for the time being. Asa

matter of fact gifts are usually made to a Sanyasi or Mohunt personally in recognition of his sanctity. But Sanyasis never arrogated to themselves the right to hold property in their personal capacity. On principle they can hold no property. Thus all properties given to a Sanyasi belong to the Mutt to which he belongs. But his right to dispose of it in any way he likes, except for his own worldly advantage or pesonal enjoyment, is undoubted. It would thus follow that the right to nominate his successor as a rule existed with a Mohunt. This is a matter with which I shall deal hereafter.

As regards tanks and gardens, they may be dedicated to the use of the public or to the God Shiva by the ceremony called *utsarga*. There is no Shebait or trustee necessary. On consecration, it ceases to be the property of the dedicator according to the Smritis and according to Raghunandana, Jagannath, and the Vivada Ratnakara and the Vivada Chintamani; but Mandliak cites the Vira Mitrodaya, which says that in dedicated things, the dedicator has a certain kind of limited ownership, and is of opinion that "the repair and control of the things thus dedicated and the ownership of which has been renounced, generally rest with the renouncer according to the usage of the country." It was, however, held in some early cases that lands given for digging tanks was for the public

benefit and was lakhiraj, if granted before 1790. (Harnarayun Gossan *v.* Shumbhu Nath, 1, W. R. 6. Peezuddin *v.* Madhusudan, 2 W. R. F. B. 15. Bengal Coal Co. *v.* Hurdyal, 9 W. R. 43.)

It has been held that under the Hindu law an idol as symbolical of religious purposes is capable of being endowed with property but express words of gift to such idol in the shape of a trust or otherwise are required to create a valid endowment (Bhugobutty *v.* Gooroopro-sonna, 25 Cal. 112).

The necessity of a trust is a modern peculiarity of the English Law. The Hindu law like the Roman law, recognizes corporate bodies and also juridical persons or subjects called foundations, and a Hindu may establish a religious or charitable institution and endow it without the intervention of a trust (Dakor Temple case, 12 Bom. 371). But endowments now are usually created by deeds, and Shebaits and trustees are appointed by them, though as we have seen before, documents are not absolutely necessary.

What is necessary in creating a Debutter is that the donor must wholly divest himself of the property. Actual dedication must be proved. It has been held that appropriation of part of the income to the service of God, without actual dedication is not sufficient. But appropriation of the income is very cogent proof of actual dedication. It has been held by the

Privy Council that even the purchase of a property in the name of an idol, though it may be good evidence of dedication, is not by itself sufficient when it is proved that there was in reality no dedication (Nimye Charan *v.* Jogendra, 21 W. R. 365.)

It is very often a matter of great difficulty to ascertain whether there has been an actual dedication. Ostensible trusts are often created for the purpose of defrauding creditors or for the purposes of defeating the provisions of the laws about descent, and for preventing alienation. The conduct of parties in such cases must be looked into to ascertain the truth. The mode of appropriation of the profits is the most important matter to consider in this connection. Deeds very often go for nothing, for in the very nature of the thing, deeds must be always prepared in cases of fraud. The mere execution of a deed dedicating property to a deity, in the absence of any act showing that the executant really divested himself of the property by at least appropriating the profits to the worship of the God, is not sufficient.(1) There is a text of Matsya Sutra cited by Raghunandana which is to the following effect: "Having made offerings to a God the sacrificial fee also should then be given to the God. The whole of that should then be given to a Brahmin; otherwise it is

(1) Watson *v.* Ram Chand, 18 Cal. 10. See 8 W. R. 432, 3 W.R. 142.

fruitless." It follows from this text that the practice of enjoying the offerings by the donor or his descendants is not allowable according to Hindu Law and would tend to show a dedication to be an insufficient and invalid one. This text however seems to show that the offerings should always be given to Brahmins *i. e.* all debutter is for the benefit of Brahmins. But that is not the true Hindu Law. The Chandogya Upanishada, as we have seen before, lays down the true Hindu position. According to it, such offerings are partaken by all sentient beings and are for their benefit. It is the old pantheistic idea. To say that the offerings are the peculiar property of Brahimns is very good for the Brahmins and they have got the doctrine accepted by the people but it is not the true doctrine according to the authentic texts. However that may be, the donor or his children cannot derive any personal advantage from the endowed properties.

Whether the dedication is *bona-fide* or colourable is a question of fact. Where there has been no dedication, mere appropriation of a portion of the profits to the worship of a god, (1) or even the release by the Government as valid debutter is not enough. (2) Even the purchase of a property in the name of a deity,

(1) Rampersad *v.* Sreehari, 18 W. R. 399.
(2) Nemye *v.* Jogindra, 21 W. R. 365.

without setting up his image or appointing priests for its worship has been held not to create a permanent and inalienable endowment.(1) This brings us to the question whether the creation of an endowment without setting up an image is valid.

On the strength of the rules laid down in the Tagore case, it has been held by the Calcutta High Court that a devise to an idol not set up or which has not been "consecrated with appropriate ceremonies and so has become spiritualized" before the testator's death is invalid. (2) With all deference to the learned Judges it should be observed that though it is a fact that the idols of the Hindus before they can be worshipped require to be "spiritualized" or "made living" by mantras the images are not the gods. The gods proceed from the Supreme Being. According to Hindu ideas they are spiritual entities existing during the all but infinite period of time called a Kalpa, between one Pralaya and another. They pervade all space and also images in special, which are made for worship by those who are incapable of worshipping the invisible Deity. The gods exist apart from the images and it is absurd to

(1) Maharanée Brojo Sondary *v.* Ranee Lachmi Koonwari, 20 W. R., 95 P. C.

(2) Upendra Lal *v.* Hem Chandra, 25 Cal. 404.
Rojomoyee *v.* Trolukho Mohinee, 29 Cal. 260.
Nagendra *v.* Raja Benoy, 7 C. W. N. 121. Doorga *v.* Shiv, C. L. R. 278.

say that a dedication of property to the worship of Shiva or Vishnu is not a good dedication, if the image be not actually set up. It is possible for a Hindu to worship Shiva or Krishna as an immaterial formless entity, though all deities are worshipped by means of images, and it is thus possible to dedicate property for their worship without an image.

When a religious trust is completely created, it is not revocable by the donor.

Under the English law, when a complete voluntary settlement, whether with or without possession, is once executed, it cannot be revoked by a subsequent voluntary settlement,(1) and the circumstance that the legal estate which was vested in the trustee becomes afterwards by some accident revested in the settlor is immaterial as he will take it as a trustee (2). A voluntary settlement of land though complete on the face of it, may be set aside in equity, where obtained by force, fraud or undue influence, or where "it was not intended to take effect in the events which have subsequently happened" on the ground of mistake.(3) A voluntary settlement of land may be defeated in England by the operation of 13 Eliz. C. 5, according to which all instruments by which creditors "are or shall be in any way

(1) Newton *v.* Askew, 11 Beav. 145.
(2) Ellison *v.* Ellison, 6 Ves. 656.
(3) Haguenin *v.* Basely, 14 Ves 273. Forshaw *v.* Welsby, 30 Beav. 243.

disturbed, hindered or delayed or defrauded" are void. When the settlor was insolvent at the time or substantially indebted, or the object of defeating creditors may be inferred from a person settling his whole property and so depriving himself of the means of paying an existing debt, the settlement is bad. (1) These rules have been held applicable in India.

(1) Lush *v.* Wilkinson, 5 Ves. 384. Taylor *v.* Coenen, 1 Ch. D. 636. Townsend *v.* Westacott, 2 Beav. 340. Smith *v.* Cherill, 4 L. R. Eq. 390. See Lewin on Trusts, p. 77.

LECTURE IX.

VALID AND INVALID ENDOWMENTS AND CONSTRUCTION OF DEEDS CREATING THEM.

We have seen before that under ancient Hindu law, land was not alienable at all. Even during Buddhist times, we find that land was inalienable. But the alienability of land, especially for religious purposes, was slowly established. Even then, the gift of one's entire wealth was forbidden. Manu says: "The counterfeit piety (*dharmapratirupaka*) of the man of means with the practice of charity to strangers, while one's own family lives in wretchedness, is (in the end) like taking poison though (seeming like) honey (at first)." Yajnavalkya also lays down (2 Ch. 135) that gifts may be made only without detriment to the family. These rules of Hindu law were given effect to in Bengal in early cases. (1) But the power of a Hindu, even when there are sons, under the Dayabhaga school, to dispose of ancestral property as he likes, was established

(1) Radhabullabh Tagore *v.* Gopee Mohan Tagore, F. Macnaghten 335. Gopal Chunder Carforma's case, F. Macnaghten. 320 app. 51.

as early as 1831 in the famous case of Juggo Mohun *v.* Nemoo. (1) As we have seen before, under the Mitakshara school, it is now well established that an alienation of joint family property except for necessity is invalid and that a man can dispose of his separate or self-acquired property in any way he likes. But in respect of ancestral immoveable property, it has been held in the case of Raghunath Prasad, that the father may make a gift of a small portion for pious uses. (2) On similar grounds, gifts of small portions of property by a widow was held valid, but recent cases have laid down that except for necessity, they cannot be upheld. According to the law, as laid down by the Mitakshara, and the reason of the rulings of our Courts, such gifts by the father would be invalid. But according to the Rishis, the father may make a gift for religious purposes. Katyayana says: "What a man has promised in health or in sickness for a religious purpose must be given; and if he die without giving it his son shall doubtless be compelled to deliver it." It would thus be strictly in accordance with Hindu law, if the rule in the case of Raghunath Prasad was given effect to.

It is now a settled principle of Hindu law that a gift can be made to an idol which is

(1) Morton 90. See Moteelal *v.* Mitter geet 6 S. D. 73.
(2) Raghunath Prasad *v.* Gobind Prosad 8 All 76.
Muddun Gopal *v.* Rambaksh, 6 W. R. 71.

considered as a *caput mortuum.*(1) It is also well established that the gift of one's whole estate to an idol is valid.

A devise or a gift in favour of an individual may be bad, but may be good when in favour of an idol.(2) All clauses in restraint of alienation or partition may be bad in case of an individual but are good in case of an idol, as well as, all directions to accumulate the income of endowed property for any indefinite period.

The rules laid down in the Tagore case have been held applicable in the case of trustees of religious endowments and hereditary offices. Thus succeeding life-estates cannot be created for the management of an endowment. (3) The rules of construction depending on the Tagore case and Kamalbasinee's case also, should for the same reason be held applicable in the case of endowments. In Kamalbasinee's case (4), it was held, that the rule, that under the Hindu law, a devise to be effectual must be to one in existence at the time of the testator's death is an inflexible one, and a bequest to a person born after the death of the testator but before the termination of a previous estate is invalid.

It has been laid by the Privy Council that

(1) Kumara Asima *v.* Kumara Krishna, 4 B.L.R., O.C.J. 47.
(2) Gnana Sambanda *v.* Velu, 27 I. A. 69.
(3) Gnanasambandha *v.* Velu, 23 Mad. 27. Tagore *v.* Tagore, 9 B. L. 377. Krishnaramonee *v.* Ananda Krishna, 4 B.L.R., O.C.J. 231.
(4) Narendra *v.* Kamalbashinee, 23 Cal., 563 P.C.

the creation of succeeding life-estates for the management of an endowment is invalid (Gnasambandha *v.* Velu (1). It has been recently held in Calcutta, that a devise of shebaitship to the eldest nephew and after him to his eldest son and so on, was good so far as the nephew and his son, who were living at the time, were concerned, but the Court declined to decide the question whether it was good so far as their successors were concerned (Manorama *v.* Kalicharan, 31 Cal. 166). In another case, where the devise was to the testator's "daughter, her husband and their male children in succession," it was held to be one creating life-estates in the shebaitship to the sons of the daughter in succession and as such, not impugning the above rules (2). A Hindu cannot tie up property further than by creating a series of successive particular estates in favour of persons in existence at the time of his death.

We have already seen that a settlement, which is in perpetuity for the male descendants of the testator and is not a real dedication for the worship of an idol is void (Promotho *v.* Radhica, 14 B. L. R. 175). In the case of Sonatun Bysack, however, the Privy Council upheld a Debutter the management of which

(1) Gnanasambandha *v.* Velu, 27 I. A. 69.
(2) Gopalchunder Bose *v.* Kartic, 29 Cal. 160.

was to go to the male descendants of the testator. The case has been distinguished in the later case of Ashutosh Dutt *v.* Doorgacharan (5 Cal. 439 P. C.). When it is not shown that the property had not been entirely transferred from the family and dedicated to an idol but a part of the income was intended for the worship of an idol, the property is partible, subject to a trust in favour of the idol (1).

The English rule of perpetuities is thus stated by Lord Chancellor Nottingham, in the Duke of Norfolk's case: "A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant-in-tail in possession, to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate: such do fight against God, for they pretend to such a stability in human affairs, as the nature of them admits not of, and they are against the reason and the policy of the law and therefore not to be endured" (2). They have placed a limit in England which is thus stated by Jessel M.R.: "Property could not be tied up longer than for a life in being and twenty-one years after. That is the rule against

(1) Ashootosh Dutt *v.* Doorgacharan, 5 Cal., 439 P. C. Phati *v.* Damodar, 3 Bom. 84. Sonatun Bysack *v.* Sreemutty Juggatsondree, 8 Moore 66. Ramcoomar Pal *v.* Jogender, 4 Cal. 56. Suppammal *v.* Collector of Tanjore, 12 Mad. 387. Sookhmoy *v.* Sreemutty Manohurri, 12 I. A. 103. Chundermany Dassi *v.* Motilal Mullick, 5 C. L. R. 496.

(2) 3 Ch. case, at p. 31.

perpetuities" (1). The rule applies to a person, a private society or a class or religious order (2). The only exception is when property is devised for charitable purposes (3). A settlement by way of endowment on a family, private society or religious order is void but a perpetual provision or endowment for charitable purposes has always been upheld. A trust for public religious purposes only however, and not a private religious trust comes within the operation of the rule (4).

In English law, charity in its legal sense comprises four principal divisions: (*a*) trusts for the relief of poverty, (*b*) trusts for the advancement of education, (*c*) trusts for the advancement of religion, (*d*) and trusts for other purposes beneficial to the community not falling under any of the preceding heads. (Commissioner of Income Tax *v.* Pennel) (5).

In Bombay, it has been held that all trusts for religious purposes in India are public religious trusts. It has also been held in Bengal, that it being assumed to be a principle of Hindu law that a gift can be made to an

(1) In Re Ridley L. R., 11 ch. D. 649.

(2) In Re Clark's trust L. R., 1 Ch. D. 491. In Re Dutton L. R. 4 Ex. D. 54. In Re Delaney's Estate, 9 L. R. Ir. 226. Cocks *v.* Manners, L. R. 12 Eq 574.

(3) Cocks *v.* Manners, L. R. 12 Eq. 574. Yeapcheah *v.* Ougching, L. R. 6 P. C. 394.

(4) Kehoe *v.* Wilson, L. R. Ir. 7 Ch. 10. Yeapcheah *v.* Ougching, L. R. 6 P. C. 394.

(5) A. C. 1891, p. 583.

idol which is a *caput mortuum* and incapable of alienating, you cannot break in upon that principle by engrafting upon the English rule of perpetuities (1), and also the rule that all restraints upon alienation are void. The English rule of perpetuities is thus not applicable to Hindu endowments, private or public, which are governed by the rules of Hindu law.

The rule of Hindu law that a devise to one unborn is invalid can have no application to Debutter, for gods cannot be unborn (2), though as we have seen before, it has been held that a dedication in favour of an idol not set up or consecrated is void. (3) But as to the devolution of the office of the Shebait, as we have seen before, the rules of the Tagore and other cases have been made applicable, though it is difficult to see how they can be so. The rules about trustees of public charitable trusts in England can at the most be applicable to such trusts.

In England gifts for religious purposes are, *prima facie* gifts for charitable purposes (In *re* White, 2 Ch. D.42) and charitable gifts to nonexistent corporations or societies have been upheld.(4)

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(1) Kumara Asima *v.* Kumara Krishna, 2 B. L. R., O. C. J. 47. Goberdhun Bysack *v.* Shaym Chander Bysack, Bourke, 282 note.

(2) Jagannath says : "God is a being whose essence is a text of the Scripture" (Colebrooke's Digest, Book 5, Ch. 1, Com. 2, Mad. Ed.,Vol. 2, p. 151. See also Yajnavalkya I. 339, II. 132, Manu IV. 226). This view is the view of the Mimansa, which is not accepted by the Hindu theists. (3) Uperdralal *v.* Hem Chandra, 25 Cal. 404.

(4) Attorney General *v.* Bishop of Chester.

A trust may be void for indefiniteness. In the case of Runchordas *v.* Parvatibai, where a trust was made to Dharam, the Privy Council held it was void for indefiniteness. (1)

In England when the devise is for purposes more than charitable such as 'charitable and benevolent' (2), it has been held to be bad. In Calcutta, a devise to an executor in trust "to spend and give away the whole of the residue in charity, in such manner and to such religious and charitable purposes, as he may think proper" has been held to be good. (3) It has also been held that a direction to the executor to set apart a specific sum 'for distribution among the testator's poor relations, dependents and servants' is a valid charitable bequest. (4) But a bequest "for pious acts to procure future bliss" was held to be bad for indefiniteness. (5) The word Dharam has been interpreted to mean more than charitable and religious purposes (6), and it is on the ground that the objects, which can be considered to be meant by the word, are too vague and uncertain for the administrations of them to be under control, that a devise for Dharam has been held to be bad.

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(1) 23 Bom. 251, 26 I. A. 71.
(2) Morice *v.* Bishop of Durhman, 10 Ves. 521. Blair *v.* Duncan, 1902, A. C. 37.
(3) Parbati *v.* Rambarun, 31 Cal. 166.
(4) Manorama *v.* Kali Charan, 31 Cal. 166.
(5) Shib Chunder Mullick *v.* Tripura, Fulton 98.
(6) Moraji *v.* Nenbai, 17 Bom. 351. Dev *v.* Motiram, 18 Bom. 136.

In England, the rule of resulting trusts does not apply to trusts for charitable purposes. In Lewin on Trusts, p. 161 we find the law stated in these words :

(1) "Where a person makes a valid gift, whether by deed or will and expresses a general intention of charity, but either particularizes no objects or such as do not exhaust the proceeds, the Court will not suffer the property in the first case or the surplus in the second, to result to the settlor or his representative, but will take upon itself to execute the general intention by declaring the particular purposes to which the funds shall be applied.

(2) When a person settles lands or the rents and profits of lands to purposes which at the time exhaust the whole proceeds but in consequence of an increase in the value of the estate an excess of income subsequently arises, the Court will order the surplus, instead of resulting to be applied in the same or a similar manner with the original amount."

These doctrines, if applied to the case of Ranchordas, would not make the devise in Ranchordas's case wholly void. The Court could have taken upon itself to execute the general intention by declaring the particular purposes to which the fund should be applied. In England, a trust "for the relief of the poor" has been construed to authorize an application of the funds to the building of a school-house and the

education of the poor of the parish.(1) The Privy Council have applied the *Cy Pres* and similar doctrines to trusts in India and thus, when the intention is clear, a religious or charitable trust should not be allowed to lapse, if possible. The distinctions made in English Courts and in India, seem to be too technical and fine and serve no beneficent purpose.

We have already seen how trusts, which are merely colourable or intended to defeat the provisions of law, are void and they need not be described again. When it is not shown that the property had been wholly transferred from the family and dedicated to an idol, a trust may arise in favour of the idol and the property becomes partible but subject to the trust (2). The matter is fully dealt with hereafter.

It is often a matter of great difficulty to ascertain whether a devise is to an idol or to the worshipping priest. When the devise is in lieu of salary for worshipping or doing some service to the idol, it is a gift to a person subject to the performance of service. But a gift is often made for service and for defraying the expenses of the worship. In such a case, the gift has been very frequently considered as a personal one and the property has been held to be partible, subject to a trust for the performance of worship of the idol by turns by the heirs of the donee.

(1) Attorney General *v.* Mayor of Stamford, 2 Sw. 592.
(2) Ramcoomar Pal *v.* Jogendra, 4 Cal. 56. See 5 Cal. 439, 3 Bomb. 84, 12 Mad. 387.

LECTURE X.

Religious Institutions.

There is no trace of the existence of religious institutions during the Vedic times. The Vedic ceremonies required many priests to perform them. In some of the early Riks, we read that persons carrying on some of the trades and professions, afterwards considered very low, could officiate as priests, showing that when those Riks were composed the institution of the Brahminical caste of priests had not taken root. It is true nevertheless, that before the Persians and the Indian Aryans parted company, the caste of Atharvans or priests, who lived by reciting charms, incantations and mantras, had been formed. The necessity of having many priests for the performance of *yajnas* and the great prevalence of the latter, probably, led to the formation of a peculiar caste called Brahmans in India. We have also, seen how this led to the schools of Brahmans. But even then, we do not find any mention of Sanyasis. There is no doubt however, that Manu's celebrated division of life into Asramas

had very early come to regulate ancient society of the twice-born classes in India, for the Grihya Sutras are all based on this division of life. The four Asramas, as you all know, are those of the Brahmachari or the student, of the Grihastha or the householder, the Banaprastha or the person who has left the world and the Yati or the complete ascetic. It is difficult to conceive that the inhabitants of a large country could regulate their lives by so high an ideal. But some did and many tried to do so. The Asrama of the Brahmachari or the student however, must have been very popular, as otherwise the schools could not have existed. There were also many Banaprasthas and Yatis. There were also whole-life Brahmacharis. These were the true Sanyasis.

But who were those numerous ochreclad persons, whom Buddha saw wandering over the broad plains of India, practising the most awful austerities? Who are these Jatilas of matted hair, who imitated Siva, the Kapardin of the Vedas, he whose hair was like the rays of the fire? The Vedas and the Upanishads do not speak of them. But there is no doubt they existed. They were the followers of the great Siva, the wanderer, the contemner of all worldly things, the teacher of joyful indifference to pleasure and pain. This cult may have the same origin as the corrupt cult of the worship of Baal and of

the goddess Astorath or may have its origin in some occult practices of the demon worshipping aborigines of India. The wandering magicians and snakecharmers, who call themselves, Yogis, all probably came from outside India. Among Indians, this cult assumed the Aryans form of a pure and glorified idealism, which was accompanied by a lower cult of practices which found expression in the Tantras, which probably originated in Gandhara or in Mahachina or Tibet. It is wonderful to conceive that the same cult should have been the origin of ascetism of the purest form and also of the most immoral and revolting practices. However that may be, before the time of Buddha, these wanderers, Paribrajakas, as they were called, existed. They were without home, wife or mistress, the proud contemners of the joys and pains of this world and of the next, the philosophers who taught the impermanence of all things and searched after a condition of changeless joy. The austerities they practised had probably their origin in the self-torture of the devotees and prophets of the corrupt deities of ancient Western Asia intended to please their cruel gods or of the magicians of the Indian aborigines and Tibetans. Among Aryan Indians, the ideal of life that prevailed led to the austerities being looked upon in a different light. The growth of pantheism despoiled the millions of

gods of their glory, and it was thought that a mere man might become greater than the gods by extraordinary self-mortification. One who could master his own body and mind was master of all. Certain extraordinary powers of clairvoyance, and clairaudience, of healing by mesmeric or other unexplained means and of raising the body above ground, which we even now find possessed by those engaged in the practices of the Yoga, and the wonderful Riddhis and Siddhis, which these practices are supposed to give and which we find mentioned in Hindu and Buddhist books, were the result of *tapas*. The word *tapas* we find mentioned in the Rig Veda. It was considered better than sacrifices. The Aiterya Brahmana, XI. 6-4, says "Heaven is established on the air, the air on the earth, the earth on the waters, the waters on truth, the truth on the mystic lore of the sacrifice, and that on *tapas*." The greatest of all *tapas* is the restraint of the breath and is the *sine qua non* of every kind of worship, since the remotest period in India. A Brahmana has had to practise it every day with his Sandhya, since the time of the Vedas. The other kinds of *tapas* or austerities are too numerous and variegated to be mentioned here.

Professor Rhys Davids in his book on Buddhist India, anxious to show that everything good in Hinduism is post-Buddha, has expressed

his opinion that the famous theory of Asramas was a post-Buddha device of Brahmins and that the wandering ascetics were the philosophers, who were the antagonists of the Vedic ceremonies and who made them unpopular. Both these opinions are against the weight of authority. The Grihya Sutras were based on the theory of the Asramas. Indeed it seems that this theory of the Asramas was the ideal of life supposed to be prevalent in ancient times, for which the moderns were striving. Again the Rishis, the great guides of Hindus, were not Sanyasis. There were asceties or Tapasvis, among them, such as the Balkhillas, but these Tapasvis were not wanderers. We only know of one or two such wandering ascetics, namely Durvasha the terrific, with his matted hair and angry eye-brows, supposed to be a part-incarnation of Siva, who wandered about with his thousand disciples, and Ashtabakra and Dattatreya. Durvasha was probably one of many such wanderers with matted hair. But it is not right to say that they were the philosophers of India, as in that case the books would not have wholly ignored them. Professor Rhys Davids cites the example of Uddalaka Aruni as showing how these philosophers went about seeking arguments and discussions. But the chief among such men, who sought subtle arguments, as Janaka says in the Vrihadaranyaka, was the householder Yajnavalkya with his two famous wives.

Hindu society considered all these Sanyasis as outside the pale of orthodoxy, till the time of Sankara, one of whose principal achievements was the defeat of Madana Misra, the savant, and the champion of orthodoxy, who maintained that no one could be a Sanyasi, who had not passed through the stage of the life of the married householder. Nevertheless, these wanderers, whether they came from outside India, like the Yogis (a wandering caste) or Gypsies, or not, they existed in numbers, practising strange austerities,—those that held up the hand or stood on one leg, the pluckers out of hair and beard, the bed of spikesmen, or those clad in dust or ashes, (1) those with long nails, the Dirghanakhas, the ochreclad naked persons, or the Kukkuravatiko, who behaved like dogs (2). Professor Rhys Davids mentions of a Vaikhana Sutra composed about the 3rd century A. D., and of an order of wanderers founded probably, by Vekhanaso. He also mentions two Brahmin orders the Karmandinas and the Parasarinas, whose names are found in a note on Panini IV, 110. The same learned author enumerates six orders of wanderers as mentioned in the Anguttara Nikaya (3). They are mentioned below in the words of the learned professor.

(1) Rhys Davids' Dialogues of the Buddha, I., pp. 226-232.
(2) M. I. 387.
(3) Rhys Davids' Buddhist India, p. 144.

(1) "Munda Savaka—"the disciples of the Shaveling."

(2) Jatilaka—"Those who wear their hair in braids." To do so was the rule for those of the hermits, who were Brahmins and perhaps other hermits also did so. In that case they cannot have formed one corporate body.

(3) Magandika—This name is probably derived from the name of the founder of a corporate body. But all their records have perished and we know nothing of them otherwise.

(4) Tedandika—"The bearers of the triple staff". This is probably the name given in the Buddhist community to those of the wanderers (not, hermits), who were Brahmins. They were not allowed by their rules, to wear their hair in braids but must either have their heads shaved entirely or so shaved as to leave a forelock only.

(5) Averddaka—"The friends". We know as yet nothing about them.

(6) Gotamika—"The followers of Gotama". These are almost certainly the followers of Devadatta, the Buddha's cousin, who founded an order in opposition to the Buddhist order on the ground that the latter was too easy going in

its regulations as to food and did not favour ascetism.

(7) Devadhammika—Those who follow the religion of the gods or perhaps of the God. On neither interpretation do we know the exact meaning of the terms."

Then he mentions the Jaina order called the Neganthees or "the unfettered" and the order called the Ajivaka "the men of the livelihood" as two pre-Buddha orders.

Now from these facts, the learned professor wishes to support his position that these orders were more respected than the Brahmans and that the prevalence of Brahmanical customs before Buddha's time was a myth. All this is the consequence of one-sided learning. Of the orders 1, 3, 4 and 7, it is admitted, nothing is known. The second and the fourth were no orders. The rest are Buddhist or Jaina orders. Therefore we get no further than the Jaina orders and we are where we were before the labours of the learned professor.

He has however lost sight of the importance of the hermits, the second and the fourth of those mentioned by him. The Tridandikas were not "the bearers of the triple staff", but they were the Dandis or those who had the threefold control of mind, speech and body. They were and are still known as the Yatis of the

Smritis. They were the exemplars of all hermits. All the others only imitated them. None but a Brahmin could be a Dandi. The true wanderers were however, the Jatilas. They have trod the plains of India and its hills and lived in caves and under shady trees, from time immemorial,—they the contemners of all things, lovers of ashes and the cremation ground, supposed possessors of magical powers and of wonderful medicines. Brahmins became Jatilas and brought their purity and philosophy to bear on the conduct of these ascetics. Thus there were Jatilas and Jatilas. There was the Brahmin philosopher whose conduct extorted admiration and respect from all and also the mere self-torturer, the magician and the medicine-man, both looked upon with dread by the people. It was in imitation of the shaven Yatis, and also, of the Jatilas that the non-Brahmin orders of the Jainas and the Buddhists were formed. We even now, find non-Brahmin magicians collecting large followers round them by imitating the Yatis and the Jatilas. These *pre*-Buddha wanderers were all magicians. People have got a superstitious dread and reverence of all medicine-men and fantatics, who practise self-torture and practice magic, divination &c. It is probable that they had possessed the popular mind. Buddha's great law was a protest against all magic and a reversion to pure philosophy.

Magic had destroyed worship. The Buddhist Arhats were supposed to be possessors of the most extraordinary magical powers, but they stood against them. That was their position. Buddhism in its purity and in the days of its pristine glory abhorred magic and inculcated purity and true philosophy. Buddhist Bhikkus, when they fell from their high estate, became magicians again.

The lone wanderer has a great temptation to earn his living by divination, charms and medicines. Buddha's Sangha was well calculated to prevent all these practices. They were like great colleges and monasteries of monks. Buddhism is based upon the three gems, the Triratna, the Buddha, the Sangha the congregation and the Dharma or the discipline and philosophy of Buddha. No doubt a great monk,

"bescorched, befrozen, lone in fearsome woods
naked, without a fire afire, within,
struggled in awful silence towards the goal."(1)

But the system of Buddha required a congregation before which confession of sins could be made and which would help a weak man to stand on his legs in the temptations of this world. The first followers of Buddha had no monasteries. They lived in caves and on foot of trees and put on cast-off clothes only. The rainy season of India made such a life impossible during the rains and like the Chaturmasya

(1) M. 179, Jat 1,390.

of the Vedas, the Sanyasis had their Vassa or residence during the rains. They were enjoined not to move about during these four months. A wealthy lay disciple of Buddha gave him a residence for the monks. Buddha accepted it and formed his first Sangharama. From that time, very costly buildings and gardens began to be dedicated to Buddha and his followers and the country was at a time literally covered with them. Before this, there were no monasteries and all Mutts were subsequently on the lines of Buddhist Sangharamas.

I have already told you that Buddha's Sangharamas are the originals, in imitation of which, the modern Hindu Mutts were formed. A great and abiding, and I may say, a fascinating human interest attaches to the doings of men, in India or in Europe, who forsake worldly pursuits and take refuge in monasteries. The accounts of how Buddha himself served a Sanyasi sick of dysentery, saying, that if a Bhikshu would not serve a Bhikshu no one would do so, the stories of Bhikshus being tempted by beautiful women, the devoted personal affection of Ananda towards Buddha, which was supposed to stand in the way of his becoming an Arhat, the story how Buddha's young son instigated by his mother followed his father, who would not look at him, crying after him to give him his patrimony, meaning Prabrajya, and was made a

Bhikshu, and the protest made by the old father to the great Teacher that he should not take away a minor and thus deprive his royal house of its future representative, which led to the rule that no boy should be initiated against the wishes of his father or grandfather,—all these have a peculiar charm for the Hindu mind to which the "homeless state" is the final goal of life. Let us now go to Buddha's rules of Vinaya.

A person above the age of 20 years (or 15 years according to some) (1), who was not a eunuch, a hermaphrodite, devoid of a limb, a leper, consumptive or epileptic (2), could be a Bhikshu. The ceremony of becoming a Bhikshu was called Pabbagga (pali) or Prabrajya (Sanskrit.) It is thus described: "Let him first have his hair and braid cut off; let him put on yellow robes, let him salute the feet of the assembled Bhikshus; let him raise his joined hands and say: 'I take my refuge in Buddha, I take my refuge in Dharma, I take my refuge in Sangha.' (3) The consent of the entire body of the Bhikshus in a meeting for the purpose had to be obtained and the Upasampada was conferred by the Sangha.(4) Every Bhikshu had to attach himself to a Guru or teacher, who

(1) Mahavagga 1-49-5.
(2) Mahavagga 1-60.
(3) Mahavagga 1-54-5.
(4) Mahavagga 1-28-5.

was called Acharya or Upadhya, he being called the teacher's Sardhabiharika or fellow-dweller in the monastery or Antebashika or disciple. (1) No one could take a disciple who had not been a Bhikshu for ten years.

Under the ancient Hindu system, every Brahmin had during his boyhood to go to an Acharya or Guru for learning the Vedas and other branches of learning. There were also Brahmacharis who remained with the Guru for life, leading a celibate life. But the extraordinary relationship of Guru and Sishya, among Sanyasis, probably, had its origin in the rule of Buddha by which a new Bhikshu had to attach himself to a learned teacher, so that he might be properly instructed in the Dharma and the Vinaya. The practice assumed a very esoteric and sacred character from the Tantrika rites, which came into vogue afterwards. In ancient India, all the disciples living together under one Guru were the disciples of that Guru. In a Buddistic Sangha and following the practice of Buddhists, in a Hindu Mutt, the Sanyasis themselves take disciples and the inmates of a Mutt are not, with the exception of one or two, the disciples of the superior or the Mohunt.

The system followed in the Buddhist monasteries was the following. There was a head of

(1) Mahabagga 1-28-4.

every establishment called the Acharya. There was a line of great teachers, beginning with Buddha well-known to the ancient Buddhist world. They were the chief of all Buddhists. But every establishment had its own Acharya, who in the early days of Buddhism could only be one, who was pre-eminent among his fellow monks by his age, learning and sanctity. There was no voting in the election of a superior. There was generally nomination by the superior of his successor. Buddha nominated Kasyapa to be his successor.

The constitution of a Sangharama under Buddha's rule was that the oldest Bhikshu was to be the superior. (1) But if he was not learned, the most learned could be appointed to the post. (2) Property however, could not be appropriated exclusively according to seniority. The Bhikhus in meeting assembled would appoint one of them, who was to be the regulator or apportioner of lodging houses and beds and food. (3) All disputes in a Sangha were settled by votes. (4) This was the Buddhistic rule. In a Sivite Mutt also, there are officers like the Buddistic regulators and apportioners. But the power of the Mohunt has come to be regarded as supreme for reasons mentioned before. But what was the original system in India must not be forgotten.

(1) Kullavagga VI. 6.
(2) Mahavagga 2-17.
(3) Kullavagga VI. 2.
(4) Kullavagga IV. 9.

As to the property of the monasteries, the Buddistic Vinaya lays down that the following things are untransferable and indivisible :—"an Arama (the monastery and immoveable property appertaining to it), a Vihara, bed, chair, bolster, pillow, brass vessels, razor, axe, hatchet, hoe, spade, and crokery."* If a transfer was made it was void. That the property of a Hindu Mutt is also untransferable and indivisible is also beyond dispute. But I believe Buddha's rule was the origin of the Hindu rule also.

In course of time, Tantrikism got possession of Buddhism and secret practices superseded public confessions, the Pratimoksha and the Vinaya. The Jatilas or Sanyasis with the braided hair had become discredited but had not disappeared altogether before the shaven monks. They wandered over the land dreaded and sought by all for the mystic power supposed to be possessed by them. When Buddhist monks took to mystic practices, the Jatilas regained their position in society.

About the 8th century A.D. a young Deccan Brahmin of extraordinary intellect and learning joined the ranks of the ochreclad austere Dandis, who because they were learned Brahmins leading a pure ascetic life, were more respected than mere Jatilas, who never were and have never been quite a respectable class. He

* Kullavagga VI. 15.

founded or rather re-established the school of Vedantists, wrote commentaries on the Vedanta Sutra and the Upanishads, which are the wonder of all learned men. He went about preaching his Vedantism, defeating in argument every one who ventured to question his position, Hindus and Buddhists, and as a sign of his universal conquest seated himself on the seat of Saraswati or the goddess of learning in Kashmir. The pre-eminence of Buddhist monks for subtle argument was lost for ever and they lost with it the hold of the popular mind. The Hindu priests fared no better. The Mimansists were then the leading philosophers of India. The chief of them Mandana Misra violently assailed Sankara on the ground that the Smritis recognised no Sanyasis who had not passed through the married state. One of Sankara's great victories was the conversion of Mandana, who joined the rank of Sanyasis under the name of Sureswara. Sanyasis flocked round Sankara eminent for their learning. He had the Buddhist establishments before him and established monasteries, called Mutts, on their model. His object was that these places should be great seats of learning where the vedantic philosophy would be taught. At a time, these Mutts were the controlling authority of Hindu society, as even now the Mohunt of Sringeri Mutt is the un-

questioned arbiter in all matters concerning Hindu social rules in Southern and Western India, and played a great part in the re-establishment of Hinduism in India. All the superiors of these Mutts were and are still called Sankaracharyas after the great teacher, probably, to show that they are to some extent his incarnations. In these Mutts, there was no place for the magicians, who became discredited for good. But they are still there, wandering about the fair land of India, with all their claims to mystic power, healing, child-giving, fortune-telling and the like, and making disciples of many even among the most educated of modern Indians. Many of these seek the shelter of Sankara's Mutts as giving them a position of credit and pure livelihood. All of them affect to owe nominal allegiance to Sankara or Ramanuja. Only few are of Buddha's or Sankara's type, contemners of magic and all things of this world and of the next, the philosophers who pretend to be greater than the gods. But the great majority of them are men of little or no learning, the pure magicians and fortune-tellers and medicine-men. Buddha failed and Sankara also failed to make the magician a philosopher ; so great is the hankering of the human mind for the things of the flesh obtained by ordinary labour or by supernatural means, the latter being infinitely more fascinating than the former.

Sankara's system was very simple. He placed one of his chief disciples in charge of a Mutt with full powers. The latter by his learning, and sanctity, in his turn, collected disciples round himself. There was nobody to question his authority and he had the power to nominate his successor. Nomination was thus the ordinary rule. But if he died without nominating, the first in point of the time of initiation among his disciples would be the most likely to succeed. But if he was not competent, the Sanyasis would elect another whom they would like to follow. The Sanyasis evolved a sort of a genealogy, according to which one's Guru was the father, and the Guru's Guru, the grand-father, and so on. Thus they had brothers, uncles, grand-uncles etc., according to the spiritual relationship mentioned above. Surprising as it may appear, men who had cut off all natural ties regarded the spiritual relationship as binding and thought that succession to their property was to be governed according to it, by analogy to the ordinary rule of inheritance. Thus the Chela or the disciple, who was in the position of the son, was entitled to succeed before the Gurubhai, *i.e.* fellow-disciple or brother.

According to a treatise called Sanyasagrahana Paddhati by Sankaracharya, Sankara had four principal disciples: Swarupa or Biswarupa, Padmapada or Padmacharya, Trotaka and Prithwi-

dhara. These were placed in charge of the four first principal Mutts. They made disciples, who again formed themselves into ten orders of the present day Sanyasis called Dasnami Mahapurushes (1). Swarupa's Mutt was Saroda Mutt of Dwarka and his disciples were called Tirtha and Asrama, who instituted orders of those names. Padmapada's Mutt was Bhogburdha Mutt of Puri and his disciples and orders were Bana and Aranya ; Trotaka's (2) Mutt was Jyoti Mutt of Badrinath and his disciples and orders were Giri, Parvata and Sagara. Prithwidhara's Mutt was Sringeri or Sringagiri on the Tungabhadra and his disciples and orders were Saraswati, Bharati and Puri (3).

Wilson thus describes the Dasnamis. "The spiritual descendants of Sankara in the first degree are variously named by different authorities but usually agree in the

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(1) तीर्थाश्रमवनारण्यगिरिपर्व्वतसागराः ।
सरस्वती भारती च पुरी नामानि वै दश ॥

(2) Trotaka or Totaka was known as Giri. See Sankara Digbijaya, 11 Ch. 67. Prithwrdhara was probably another name of Sureswara, and Swarupa was probably the same as Hastamalaka.

(3) शङ्कराचार्य्यस्य चत्वारः शिष्याः स्वरूपाचार्य्यः पद्माचार्य्यः तोठकाचार्य्यः पृथ्वाचार्य्य इति । अथदशनामानि स्वरूपाचार्य्यस्य शिष्याहयं तीर्थ आश्रमश्चेति पद्माचार्य्यस्य शिष्याहयं वन आरण्यश्चेति तोटकाचार्य्यस्य शिष्याहयं गिरिपर्व्वत सागराइति पृथ्वीधराचार्य्यस्य शिष्याहयं सरस्वती भारती पुरीचेति दशनामानः संन्यासिनः । अथाम्नाय मठीद्वारः प्रथमे पश्चिमाम्नाये शारदा मठ उच्यते कीटवार सम्प्रदायस्तीर्थाश्रमपदे द्वारिकाख्यं तु चैवं स्यादेव सिद्धेश्वरी भवेत् भद्रकाली तु देवी स्यादाचर्य्योविश्वरूपक. गोमतो तीर्थममलं ब्रह्मचारी स्वरूपकः सामवेदस्य वक्ता च तत्वधर्म्मं समाचरेत् । द्वितीयेतु पूर्व्वाम्नाये भोगवर्द्धमठः

number. He is said to have had four principal disciples, who in the popular traditions are called Padmapada, Hastamalaka, Sureswara (4) or Mandana and Trotaka (5). Of these the first had two pupils, Tirtha and Asrama; the second Bana and Aranya; the third had three, Saraswati, Puri and Bharati; and the fourth had also three, Giri or Gir, Parvata and Sagara. These, which being all significant terms, were no doubt adopted names, constitute collectively the appellation Dasnami or the ten-named, and when a Brahman enters into either class, he attaches to his own denomination that of the class of which he becomes a member as Tirtha, Puri, Gir &c. The

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स्मृतः भोगवारः सम्प्रदायी वनारण्ये पदं पुरुषोत्तमाख्यश्चैवं जगन्नाथोऽस्य देवता विमलाख्या तु देवी स्यादाचार्यः पादपद्मकः। तीर्थं महोदधिः प्रोक्तं ब्रह्मचारी प्रकाशकः। ऋगाद्यस्तस्य वेदस्तव धर्म्मं समाचरेत्। तृतीये तूत्तराम्नाये ज्योति स्तमठो भवेत्। आनन्दवीरो विज्ञेयः सम्प्रदायोऽस्य सिद्धिकृत् पदानि तस्याख्यातानि गिरिपर्व्वतसागराः। बदरिकाश्रमं चैव नारायणोऽस्य देवता। देवी पुण्यागिरि चैवा तोटकाचार्य्य उच्यते। तीर्थमलकानन्दाख्यं नन्दाख्यो ब्रह्मचारीभूतः। तस्य वेदोप्यथर्व्वाख्यस्तव धर्म्मं समाचरेत्। चतुर्थं दक्षिणाम्नायो शृङ्गेरीतु मठः स्मृतः। भूरिवाराद्यस्तस्य सम्प्रदायी महोत्तमः पदानि त्रीण्याख्यातानि सरस्वती भारती पुरी। रामेश्वराद्यं चैतमादिवाराद्देवता कामाख्यातस्य देवी स्यात् सर्व्वकामफलप्रदा। पृथ्वीधराद्य आचार्य्यस्तुङ्गभद्रे च तीर्थकम्। चैतन्याख्यो ब्रह्मचारी यजुर्वेदस्य पाठकः। इति संन्यासग्रहण पद्धतिः।

(4) According to the genealogy of the Mohunts of Sringeri Mutt, however, which has been supplied to me, Sureswara succeeded Sankara as Acharya there. The fifth was a Giri; from the eighth to the eleventh the Mohunts were Tirthas and from the 13th to the present Mohunt who is the 34th Guru, the Mohunts have all been Bharatis. It is difficult to reconcile the genealogy with the account given by the Sanyas Grahana Paddhati. The fact shows that Giris and Tirthas in early times could succeed to a Mutt of Bharatis.

(5) This is according to Sankara Digbijaya, Ch. 11, v. 10.

greater proportion of the ten classes of mendicants thus descended from Sankara Acharya had failed to retain their purity of character and are only known by their epithets as members of the original order. There are a three and a part of a fourth mendicant class or those called Tirtha or Indra, Aranya, Saraswati and Bharati, who are still regarded as really Sankara's Dandis. These are sufficiently numerous, especially in and about Benares. They comprehend a variety of characters but amongst the most respectable among them are to be found very able expounders of the Vedanta works. Other branches of Sanskrit literature owe important obligations to this religious sect."

"The remaining six and a half members of the Dasnami class, although considered as having fallen from the purity of practice necessary to the Dandis, are still in general, religious characters and usually denominated Atiths. The chief points of difference between them and the preceding are their abandonment of the staff; their use of clothes, money and ornaments; their preparing their own food, and their admission of members from any order of Hindus. They are often collected in Mutts, as well as the Dandis, but they mix freely in the business of the world; they carry on trade, and often accumulate property, and they frequently officiate as priests at the shrines of the deities; some of them even

marry, but in that case, they are distinguished by the term Samyogi from the other Atiths." (1) Wilson is not correct when he says that Sudras may be admitted into the ranks of Atiths. The Dandis claimed that none but Brahmins could become Sanyasis. But among Dasnamis, it has been established that any one belonging to the three twice-born classes can be a Sanyasi. There is a well-known Sanskrit treatise called the Traibarnika Sanyasakasara by Swami Kailash Parvat establishing the position. But Dandis, strictly so called, would never acknowledge any but a Brahmin to be one of their order.

I have given the above account of the Dasnami Sanyasis to show to what sources we should look for the customs of the different orders. The original of the Mutts of Giri, Parvata and Sagara was the Mutt at Budrinath. All Mutts of these orders should be considered as branches of the Budrinath Mutt and the original customs must be sought at Budrinath, and in case of failure of all superior and inferior Mutts of any one of these orders the Budrinath Mutt has the reversion. Similar remarks apply to the other Mutts of the other orders.

But the original four Mutts are not now regarded as superiors by most of the Dasnamis. After the formation, rather the falling off, of the Dasnamis called Atiths from the high ideal of

(1) Wilson's Hindu Religions, pp. 130-132.

Sankara, individual Atiths successful in worldly business started large and wealthy institutions with numerous subordinate Mutts, called Murhis. Again, the disciples of these original Mutts also, established independent Mutts owning a nominal allegiance to the Mutts founded by their Gurus. These Mutts are now the largest holders of land after the Rajas. Thus though the wealthiest orders of India have their own superior and inferior Mutts distinct from the principal Mutts of Sankara, two or three of them, such as the Sringeri and the Saroda Mutts have maintained their pre-eminent position and influence over Hindu society; and for purity of conduct and custom, the original Sankara Mutts must be sought by the enquirer.

The Dasnamis used to besmear their bodies —a distinctive mark of Saiva Sanyasis. The Vaishnava Sanyasis do not so besmear. The modern degenerate Dasnamis of the six and a half classes, very seldom comply with the rule. Besmearing the body with ashes was not necessary with a Yati according to the Smritis. It is mentioned in the Sankara Digbijaya that Sankara was taken to task for besmearing his body by a Kapalika, as that was the latter's distinctive mark. It appears, that before Sankara's time, the wanderers besmeared their bodies. Their descendants are the Kanphata Yogis, the wandering snake-charmers and the

magicians. All the establishments having properties belong either to Sankara's Sanyasis or the Vaishnava Sanyasis. The Kanphata Yogis, who call themselves Naths, have a few poor establishments. The most important of the Saiva Yogis, the old Pasupats, are the Jangamas or Lingayats of Southern India. They take in Sudras as Sanyasis and have got many Mutts.

In this confused babel of all sorts and conditions of ochreclad Sanyasis, the true Jatila is seldom seen. But he still exists. He is still found here and there, under various denominations, solitary or with one or two disciples, practising the same austerities which excited the compassion of Buddha. We have also still the curious type of Yogi who hangs himself head downwards between fires, the man who holds up his head or stands on head, he who lies on the bed of spikes and others of this kind. These belong to no order and for them no law is necessary. They pretend to be above the laws of nature and have got no establishments and few disciples and fewer properties.

I have described to you the Saiva Sanyasis. The Vaishnava Sanyasis, who are called Vairagis also have Mutts in imitation and on the model of Sankara's Mutts. The Vaishnavas have four sects, Ramanuja or Sri Sampradayis, Vallabhacharis or Rudra Sampradayis, Madhwacharis or Brahma Sampradayis and

Nimavats or Sanakadi Sampradayis. The Ramanuja Sanyasis are all Dandis and Brahmans. They are very strict in their observances. They are very numerous in Southern and Northern India. Their original seat is at Sri Ranga on the Kaveri.

The Ramanandis are a branch of the Ramanuja sect. But they are much more numerous. By their number and influence, they predominate the whole of Northern India. They have large Mutts and Akharas and lay members and celibate members. The Mutts consist wholly of celibate members. They call themselves Dases, *i.e.* servants of the Lord Rama. They take in Sudras and low-castemen among them. Their principal seat is now at Ayodhya.

Kabir Panthis, who took Muhammadans in their ranks, are an off-shoot of the Ramanandis. They have got large establishments in Northern India. Dadupanthis, another large sect, proceeded from the Ramanandis. Nanak also, may in some sense be considered as of the same class. Many of the Mohunts of the Kabir Sahi and Nanak Sahi sects are celibates but celibacy is not indispensable. Their Mutts are called Sangats. The main divisions of the Nanakpanthis are the Udasis and the Sikhs.

Madavacharis have got eight principal Mutts in Southern India, the chief of which is at Udipi originally founded by Madhvacharya or Ananda

Tirtha, who at first belonged to one of the Dasnami sects. The superiors of Madhwa Mutts are all Brahmin ascetics adopted from their boyhood in the sect and professing perpetual celibacy. The Nimavats have two classes, ascetics and householders and have Mutts for ascetics near about Mathura.

The most important of the Vaishnava sects in Western India are the Ballabhacharis. They were founded by Ballabhacharya. Their original seat is at Gokula. They have got large establishments, rather temples, presided over by the descendants of Ballabhacharya, who are married men and do not often lead saintly lives but are accorded divine honors by their followers and are succeeded by their children in their offices, sometimes according to the rule of primogeniture. One of the richest temples in India, namely Nathdwara, belongs to them.

The Ramanandi, the Ramanuja and the Madvacharya Sanyasis sometimes assume the surnames of the Sankara's orders, though they follow the modes of Vaishnava worship. Iswar Puri and Keshub Bharati were Gurus of the most celebrated Vaishnava teachers in Bengal. Chaitanya, the greatest exponent of Bhakti in India, when he became a Sanyasi was initiated by Keshub Bharati and became Krishna Chaitanya Bharati. So great was the influence of Sankara's Sanyasis, that every respectable

Sanyasi, whether he was a Vedantist or a Bhagabat, belonged to one or the other of these orders. The Bhagabatas, or as they are popularly called the Bhaguts, have existed here in India, side by side with the Vedantists from time immemorial. The Bhaguts among the population of Northern India, are now distinguished by their abstaining from meat and their gentle conduct and the reading of Tulsi's Ramayana. The great Vaishnava Puranas, the Gita and that wonderful book, the Srimat Bhagabat embody their doctrines. But except the author of the Narada Pancharatna and Sandilya, the author of the Bhakti Sutras, we know of no Rishis who were Bhagabats, though the mass of Vaishnava literature was at one time very great. Certain it is, till the time of Tulsidas and Chaitanya, Vaishavism was not very popular in India. Chaitanya it is said, discovered Vrindaban and its famous springs. Chaitanya was a Vaishnava Sanyasi. Many persons became Vaishnava Sanyasis since his time. But still in Bengal, there are Bairagees, who generally live with women, and but few Vaishnava Sanyasis. The Goswamis or Mohunts of Vaishnavism take after Ballabhacharya and Nityanund, and are married men living upon the reputation of the sanctity of their ancestors and on the bounty of their followers, having in their charge famous shrines and images which are visited by thousands

of people. The only Vaishnava Sanyasis are the Ramanuja and the Ramanundi and the Madhwa Sanyasis. They live on the model of Sankara's Sanyasis, with the exception that instead of Sankara's Vedanta they read Ramanuja's and Madhwacharya's books, Tulsi's Ramayana and the Bhakti Shastras.

The distinction between Vaishnava Sanyasis and Sankara's Sanyasis is very well marked. The latter are all Vedantists and consider themselves equal to gods. They call themselves Swamis or lords, who after having conquered all illusions are like the Supreme Being. Their only vocation is the contemplation of the absolute truth and not the worship of any God. The Vaishnavas on the contrary are theists and practise Bhakti and mystic devotion and the daily worship of idols. Many of their Sanyasis call themselves Dases or servants of the Lord. The Vedantists eschew all the pleasures of the senses, even pictures and music. The Vaishnava delights to worship his God by means of the best of all things. The highest and purest development of the senses, the senses glorified, lead to the perception of the Supreme Being, according to them. But Pantheism has so permeated the Indian mind, that even the Vaishnava considers himself equal to God and the Guru sometimes indulges in the most corrupt practices, posing himself as Krishna. The

root of all this evil is the want of that learning and wisdom, which distinguished the founders of these wonderful philosophical systems, among their followers, during the last one thousand years of India's degradation.

In all orders of Sanyasis, except Sankara's there are two divisions, the Grihastha or the Samyogi, *i. e.* the householder and the Virakta or Nihanga or Nishanga or *i. e.* the celibate without any worldly attachments. The establishments of Nanakapanthis, Kabir-panthis and other sects, except the Dasnamis, have both descriptions of Sanyasis, and it is often a question of difficulty to decide whether a Grihastha or a Nihunga should be a Mohunt. All these so called Sanyasis are in reality Shebaits of famous shrines, temples, relies or books like the Grantha, that are worshipped. They are not, like Sankara's Sanyasis, who followed the Buddhist system and lived in monasteries as places of shelter during the rains and sickness and for study and contemplation.[3] It is not necessary for a person to be a celibate to entitle him to worship any Hindu deity. But here custom based upon imitation of the Dasnamis or the true Sanyasis, in many places, have established the rule that a person should either be a celibate or must give up all worldly things and the company of females, before he can be a Mohunt. The ascertain-

ment of the customs of these imitation Sanyasis is a very difficult task.

As regards the Akharas of Byragees, they are mostly ephemeral bodies collected round one person noted for his piety. In most cases that person leaves children, who succeed to the ownership of the properties, which may have come to the hands of their ancestor. There is no reason why these ochreclad non-descript Bairagis living with women, having no principle and no law, should be governed by any but the ordinary rules of inheritance of Hindu Law. But in the few cases of celibate Sanyasis, they are succeeded by their disciples or Gurus.

In the Akharas of Assam there were two classes of persons, in whom the government is supposed to be vested. The resident worshippers of the gods and the outside worshippers.

It has been mentioned before, that apart from the true Mutts, there are certain establishments in connection with public temples. Most of these temples were built by great chiefs or kings and endowed by them. Here the ancient books come to our help in understanding the constitution of these establishments. According to the Puranas, when a temple is built and an idol set up, the following officers should be employed: the Acharya, the Poojak, Japakas or mutterers of prayers, dancing girls, image-bearers and door-keepers. Lands, were set apart for the mainte-

nance of all these offices which were hereditary. As long as the power of the chiefs, who set up these temples, lasted they exercised control over them. But when on account of change of dynasties, revolutions, the poverty of the family of the founders or other causes, the State or the founder's family ceased to exercise any control over them, the government passed into the hands of the Poojaks, Pandas and Paricharakas. In a very large number of these temples, like Kalighat, the Poojaris assumed the ownership of the temples and the offerings and called themselves Shebaits. In many, as in Baidyanath, there are Pandas and Paricharakas having their own rights but above them all, there is a Mohunt or Sirdar Panda, who is the Acharya of the Puranas. These Shebaits or Pandas, it should be remembered, engage other persons to perform the worship, so engrossed they are with their own vocation of looking after and getting money from the pilgrims and so embued with the idea of their position of the controlling body, who should not themselves perform the Pooja but engage Poojaries for the purpose.

Now we have to consider what are the qualifications, which entitle a person to become a Sanyasi, the ceremonies necessary for becoming a Sanyasi and the disqualifications and acts which degrade one from the state of the Sanyasi.

We know that according to the orthodox rule

of the Smritis, no one who had not married and been a householder, could become a Sanyasi. But Sankara established the rule that at whatever period of his life, a man becomes without attachment to things of this world and of the next, he should become a Sanyasi (यदहरेव विरजेत् तदहरेव प्रव्रजेत्). Thus an unmarried youngman can become a Sanyasi. But can a mere boy become a Sanyasi? A very large number of Sanyasis are initiated when they are mere children. Now according to the Smritis, a boy below 8 years of age is one as if in embryo and is incapable of doing wrong and deserves no expiation and one below sixteen is a *pogondo*, who is incapable of any legal transaction and deserves only half the *prayaschitta* or expiatory punishment for a sin (1). Sukadeva, it is said, learned all the Vedas and became disgusted with the world, while he was in the mother's womb. But the rules of law are not made for such persons. It would follow from what has been stated above, that nobody is capable of being initiated as a Sanyasi before he is sixteen,

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(1) गर्भस्थमष्टवर्षीञ्चेय अष्टमाद्वत्सराच्छिशुः।
बाल आषोड़शाद्वर्षात् पौगण्ड इति शब्दते॥
परतो व्यवहारज्ञः।—Narada Ch. IV. 35, 36.
अशीतिर्यस्य वर्षाणि बाल वा न्यूनषोड़शः।
प्रायश्चित्तार्द्धमर्हन्ति स्त्रियो रोगिण एव च॥
—Angira V. 33.

for up to that age he is not fully responsible for his actions in a legal or a moral sense. Before that age, any renunciation by him of his properties would not be valid, nor can the rule that a person, who after being a Sanyasi reverts to the world becomes a slave, apply to him. The practice of making boys Chelas is immoral and opposed to public policy and as it is against the rules of Hindu Law, the Courts should never recognize it, notwithstanding its prevalence. This practice is responsible for the many hundreds of thousands of vagabond Sanyasis now roaming over India, and also for the fact that there are so few Sanyasis of the type of Sankara and his immediate successors.

An unmarried person can become a Sanyasi and such a one alone is considered to be capable of the highest perfection. The next question is can the blind, the leper, the insane and the incurably diseased become a Sanyasi. There is nothing to prevent them from becoming a Sanyasi, for it is said by some of the commentators that these are Sanyasis from birth. Sanyasis they may be, but can they be initiated so as to belong to an order? Buddha's rule is that they cannot. They are incapable of the practices of the Hata Yoga and they are never taken into any of the monasteries, though there is no prohibition.

None but one belonging to one of the twice-born classes can belong to any of the orders of

the Dasnami Sanyasis founded by Sankara. In Madras, it has been held that a Sudra cannot enter the order of Yati or Sanyasi (Dharmapuram *v.* Verapandyam, 22 Mad, 302). So far as Sankara's orders are concerned, the rule is correct. But the numerous orders of Sanyasis, namely, the Vaishnavite, the Nanakapanthi, the Kabirpanthi, the Dadupanthi and others are not governed by his rule. Thus it is that Sudras and married men can belong to these orders. The Tantrika Kulabadhuta also can be a Sudra.* He is not required to be an abstainer from the pleasures of the flesh. These persons are governed by their own customs, which are difficult of ascertainment, for they have no ancient books or documents to guide them. The Vaishnavite Sanyasis of Northern India can read only Tulsi's Ramayayana. The Nanakapanthis, the Grantha, and the Kabirpanthis, read only Kabir's book. The Bairagees of Bengal have peculiar and not particularly moral customs. It is no wonder that Sankara's Sanyasis, ignorant and immoral though many of them are, are still saints

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* ब्राह्मण: क्षत्रियोवैश्य: शूद्र: सामान्य एव च ।
कुलावधूते संस्कारे पञ्चानामधिकारिता ॥
ब्रह्मचर्य्याश्रमी नास्ति वानप्रस्थोऽपि च प्रिये ।
गार्हस्थो भिक्षुकश्चैव आश्रमौ द्वौ कलौयुगे ॥
महानिर्व्वाणतन्त्रम् । ८६

and Mahapuruses, as compared with others and regarded as such by the people.

I think I should give you here some idea of the solemn ceremony prescribed by Sankara, which is the true ceremony for becoming a Sanyasi. It is thus described in the treatise called Sanyasa-grahana Puddhati,* which claims Sankara himself for its author.

"(The person desirous of becoming a Sanyasi) should first ask in his home, his mother, father, sister, wife and sons : "O, members of the family, I desire to become a Sanyasi." Having taken their permission, he should go round his house and village and go a little towards the north. After that having bathed and worshipped the God and remembering the gods and the ancestor, would meet the Guru who is Brahmin by birth, peaceful and of good character, who has left off all works, not troubled by hunger, thirst, sorrow, ignorance, old age and death, having Brahmajnana etc., and ask Sannyas of him. The Guru dissuades him, saying that ascetism is painful. If the disciple persists, the Guru gives him Diksha or initiation. Then the disciple performs the Tarpana, the eight-fold Sraddha of the Manes, performs the Birya or Birajā Homa and shaves his hair and throws away the sacred thread. During the last Homa

* The rules of Nirnaya Sindhu and the Sannyas Martanda are very similar to the rules of Sannyasgrahana Puddhati.

in which he gives 108 oblations to the fire he repeats: "Om, let my mind, understanding, Chitta and Ahankara or sense of ego and all the senses be purified. I am light, taintless, desireless, sinless I have become." He is then repeatedly impressed with the idea and made to repeat that he is the Supreme Being—that knowledge being considered the essence of Vedanta and Sanyasa. This is the last time that he worships God and performs the Sraddhas. The Puddhati then says, as is mentioned in the Smritis, that there are four kinds of Sanyasis, Kutichara, Bohudoka, Hansa and Paramhansa. Kutichara is he who lives apart as an ascetic in a hut with his children, the Bohudoka begs his food from seven houses; the Hansa does not live more than five days in a village; the Paramhansa lives at the foot of a tree, in a vacant house, on a cremation ground and the like, indifferent to all worldly things. The Dasnami Sanyasis affect to be all Hansas or Paramhansas.

Now in course of time, excepting a very few, the million Sanyasis, that roam about the country as Yatis, are ignorant of Sanskrit. They are recruited, many of them, as boys, who are orphans or given away by their parents, and many, from the ranks of the great body of vagabonds of this country. Thus the original meaning of the ceremonies is forgotten and though they are performed they are performed in a fantastic manner more

calculated to excite laughter than that feeling of awe which ceremonies preparatory to a man's leaving this world and the hope of reward in the next, such as throwing away the Agnihotra and the sacred thread and the performance of the Sradh of the ancestors for the last time, were intended to exite.

The ceremonies prescribed for the initiation of a Dasnami Sanyasi follow the Smritis, and profess to be identical with the ceremonies for a Yati. But as most of the Sanyasis are initiated before they are entitled to be Yatis, they cannot be quite identical. According to recent practice, taking a Chela is like adopting a son and thus it is regarded by Courts and lawyers. It is an erroneous position according to the Hindu Shastras. But these modern Sanyasis have evolved a system of genealogy which justifies the introduction of the idea. Most Mutts consist of ignorant men and many take in lowcaste men. To these, the rules of the Smritis or of Sankara are obviously inapplicable. The custom of an establishment regarding the taking of a Chela should be ascertained in every case. The true test seems to be whether a person was finally taken in as a Chela and recognized as such by the Guru. Ceremonies are so varied that no reliance can be placed on their binding character in most cases. Among Dasnamis, a ceremony called the Bijja Homa

i. e. the Birajā Homa has been considered essential.(1)

In the Sudra Mutts connected with Dharmapuram in the Madras Presidency, the ceremony of becoming a Chela or Tamberan, as he is called there, is very peculiar. When a layman desires to become an ascetic, he is required to undergo a probation. On the commencement of the probation, he usually wears a red cloth called *Yattrai Kashayam.* He is from time to time taught first a form of prayer called the *Sanxiyam* and afterwards one called the *Vishesham.* After the period of probation, he is taken before the god of the Mutt, which is called Adhinam, and there he finally renounces the world and is

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According to the Nirnaya Sindhu, the Birajā Homa is recommended by some as mentioned in the Siva Gita :

अत्रविरजाहोमं केचिदाहुः। यथोक्तं शिवगीतासु—'जुहुयाद्विरजामन्त्रैः प्राणापानादिभिस्ततः। अनुवाकान्तमेकाग्रः समिदाज्यचरूनृषक्। आत्मन्यग्नीन् समारोप्य याते अग्नेतिमन्त्रतः। अस्मादायाग्नित्यादैर्विमुञ्चाङ्गानि संस्पृशेत्। पापैर्विमुच्यते नात्र संशयः। तथा प्राणापानव्यानोदानसमाना मे शुध्यताम्। ज्योतिरहं विरजा, विपाप्मा भूयासं स्वाहा" &c.

The Nirnaya Sindhu also cites the following text of Bandhayana prescribing the ceremony of Sannyas :

क्लृत्वा श्राद्धानि सर्व्वाणि पित्रादिभ्योऽष्टकं क्लृथक् वापयित्वा च केशादीन् मार्जयेन्मातृकाईमाः।

As regards the eligibility of Kshatriya and Vaisyas, the Nirnaya Sindhu after citing the following texts,

"ब्राह्मणाः प्रव्रजन्ति" इति जाबाल श्रुतिः—आत्मन्यग्नीन समारोप्य ब्राह्मणः प्रव्रजेद् गृहात् इति मनूक्तेरिति विज्ञानेश्वरादयः हृद्यायज्ञलक्ष्मोऽपि चत्वारो ब्राह्मणस्योक्ता आश्रमाः श्रुतिचोदिताः। चतिग्रस्य वयः प्रोक्ता द्वावेको वैश्यशूद्रयोः इति। माधवस्तु ब्राह्मणः चतियो वाथ वैश्यो वा प्रव्रजेद् गृहात्' इति कौर्म्मादयुक्तेर्वर्णत्रयस्याप्यधिकारः।'

Says that the three twice-born classes are eligible for Sannyas.

taught the Mula Mantra by the Mohunt who is called the Pandara Sannadhi. A ceremony is also performed by which the Tamberan makes a gift of his body, soul and wealth to the Pandara Sannadi and declares himself as Das or slave of the latter. (1) Many such fantastic ceremonies have come into vogue among various establishments, which only try to imitate the rules of the Smritis, as they are not entitled to follow them.

According to the Vinaya rules of Buddha, a Bhikshu might be expelled for the following causes: "when he destroys life, when he commit's theft or other impure act, when he is a liar, when he drinks strong drinks, when he holds false doctrines and when he has sexual intercourse with a Bhikhuni" (2). According to Hindu ideas, all these must disqualify a Yati Sanyasi and make him a *Pravrojyabashita*. What would make an ordinary Brahmin *patita* can never be tolerated in a Yati, who is supposed to be more divine than human and above all human desires. That custom is bad and of no effect, which makes impure conduct allowable. But truly no Sanyasi, if it is put to him, will ever admit the force of retaining immoral Mohunts or Sanyasis in the ranks of Dasnamis. In ancient times, according to Narada, the king reduced to slavery persons who fell from the

(1) Gnyana Sambandha *v.* Kandasami, 10 Mad. 387.

(2) Mahavagga 1-60.

high estate of Sanyasis by incontinence or coming back to worldly life.* The difficulty of dismissing a Mohunt now-a-days in our Courts of law have emboldened superiors of Mutts to indulge in practices in which they could never have dared to indulge in former times.

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* राज्ञ एव हि दासःस्यात् प्रव्रज्यावसितोनरः ।
इति नारदः ।

LECTURE XI.

The Office of the Trustee, Shebait, Mohunt &c. and their Powers.

The very interesting history of the growth of the law of trusts and Courts of Equity, in England, is, I suppose known to many of you. There are two kinds of estate in property, which have come to be recognized:—the legal and the equitable. The former vests in the trustee and the latter in the cesti-que-trust or the beneficiary. Two clear, simple rules have been laid down by English text-writers defining the extent of the quantity of the legal estate taken by the trustee. They are:

First "Wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied."

Second, "The legal estate limited to the trustee shall not be carried further than the complete execution of the trust necessarily requires."

As the legal estate is in the trustee, all actions in respect of the trust property by third parties must be brought by or against him, and he alone

has the power of dealing with it, subject to the limitations mentioned above.

The general properties of the office of the trustee have also been thus defined in Lewin on Trusts : First, "a trustee having once accepted the trust cannot afterwards renounce it." Secondly, "the office of trustee being one of personal confidence cannot be delegated." Thirdly, "in the case of co-trustees, the office must be exercised by all the trustees jointly." Fourthly, "on the death of one trustee there is survivorship, that is, the trust will pass to the survivors or survivor." Fifthly, "one trustee shall not be liable for the acts of his co-trustee." Sixthly, "a trustee shall derive no personal benefit from the trusteeship." Seventhly, "on the death of the trustee, the heir, executor or administrator becomes the legal owner of the property ; but as he merely represents the ancestor, testator, or intestate, he takes in the same character and is therefore bound by the same equity."

It is necessary to know all these rules. The rules of the English Courts of Equity are based on grounds of reason, justice and public utility and should be and are given effect to in our Courts, whenever they can be applied to the conditions of this country. I am not referring here to the highly technical rules of procedure of the English Courts but of the rules of substantive law dealing with the rights of parties. Now, you will find that all

the above rules cannot be applied to Shebaits of Debutter or Mohunts of Sannyasi Mutts. But their utility will be apparent to you as you proceed further with the consideration of the law in India. Our ancient lawgivers had no idea of the complicated state of things, which the commercial character of modern times, as also the extended and various charities and beneficence of progressive communities, have brought about. Our law of trusts should therefore follow the English law of trusts, so far as the conditions of our community and our customs permit.

Under Hindu Law, we have to deal with the nature of the office of the Shebait, the Mohunt and other Paricharakas attached to temples and Mutts, as also the ordinary trustee appointed under a modern deed creating an endowment. The Shebait is strictly a trustee for carrying on the worship of a deity. Literally the word means a person in whom the service of a deity is vested. It has been considered that the Shebait is the manager of a deity (1) or his guardian (2). Why these ideas should have found favour with modern text-writers(3) and judges, it is difficult to conceive. Why should the position of a Shebait be different from that of an ordinary trustee or that of a Mohunt be different from that of the superior of a Christian church or the Matwalli

(1) Bhuggobutty *v.* Gooroo Prosonno, 25 Cal. 112.
(2) Kunwar Doorga *v.* Ram Chunder, 2 Cal. 341.
(3) Golap Chunder Sircar's Hindu Law.

of a Muhammadan mosque? There are these distinguishing features in a Hindu temple, namely, offerings of food, clothes, ornaments, flowers and scents have to be made to the deity and daily worship has to be performed through a *poojari* Brahmin, and the gift is made nominally to the deity. Thus there is every appearance of a gift to a person. But the holding of a particular piece of land by a deity is only a make-believe. A Hindu however superstitious knows that the land is to be held in reality by the Shebait in trust for the worship of the deity. It will serve no good purpose to base rules of law on fictitious ideas. The simple rule is that the Shebait is an ordinary trustee for the purpose of keeping up a worship for all time. The law recognizes such a trust and makes the rule of perpetuities inapplicable to it, so far as it is necessary for giving effect to the trust.

Under the old Hindu Law, the image and the temple of a deity belonging to a family went to the eldest son. It is impartible and inalienable property. The office of a Shebait, where it is not regulated by deed or by custom, is hereditary, and in its very nature indivisible and would always have remained so, were it not for the fact that the Shebait always makes some profit out of the trust property. Here a distinction between the office of the Shebait and the office of the Poojari or

other Paricharaka should be clearly understood. The lands and emoluments given to the Poojari or the Paricharaka are given to him in lieu of or as salary for his services. They can therefore be taken by his proper heirs as ordinary property. The lands are Debutter because connected with the worship of the deity. The Shebait has no personal interest in the Debutter. If he makes any profit out of it, it is in breach of the trust. However, Shebaits do make profit and hence there is contention among the sons of a Shebait for his office and it is now established by custom that all the heirs take debutter property and carry on worship by turns or *palas*. On account of this rule of *palas* many a debutter has gone to ruin, and in the nature of things, when the heirs of donors of debutters number a hundred or two hundred, proper worship of the gods becomes all but impossible.

As regards Poojaris and other Paricharakas, their lands are, like lands held on service tenure, but being debutter, are inalienable and impartible. It is very often a question of great difficulty whether the property is the property of the grantee subject to the performance of the worship of certain deities or simple debutter trust property in which the trustee has no proprietory interest. As regards lands attached to a temple or dedicated to a God and granted to a Poojari or Paricharaka and his heirs on condition of the performance

of certain services, they are pure service tenures. They are inalienable and impartible and can be resumed by the Shebait or Mohunt for non-performance of services or when the holder by his acts or otherwise becomes disqualified for the performance of the services. Thus if a Poojari abjures Hinduism and becomes an outcast, he should forfeit his right.

The true position of these officers, as regards the right to enjoy the profits was defined by Sir Raymond West in the case of Manohar Ganesh *v.* Lakshmiram(1). Shevaks (all Poojaris, Paricharikas, Pandas, Sirdar Pandas and Mohunts are on the same footing) have been dividing (in the case) the offerings at their discretion, "but it by no means necessitates the conclusion that they are and have always been owners of the idol as a juridical person—Juggodumba Dassee *v.* Puddomoney Dassee(2). They are a numerous body succeeding to their offices by hereditary descent. It is admitted they are entitled to a fair provision for their needs and to maintain the service of the temple. For a period extending over several centuries the revenues of the temple seem to have but slightly, if at all, exceeded the outlay required to maintain its services but recently those revenues have very largely increased. The law which-

(1) 12 Bom. 247. Affd. 26 I. A. 199.
(2) 15 B. L. R. 318.

protects the foundations against external violence, guards it also internally against maladministrations and regulates conformably to the central principle of the institution the use of its augmented funds. It is only as subject to this control in the general interest of the community that the State through the Law Courts recognizes a merely artificial person (1). It guards property and right as devoted, and thus belonging so to speak, to a particular allowed purpose only on condition of varying the application when either the purpose has become impracticable, useless or pernicious, or the funds have augmented in an extraordinary measure. This principle is recognized in the law of England, as it was in the Roman law, whence indeed, it was derived by the modern Codes of Europe. It is equally consistent with Hindu Law which as we have seen undoubtedly recognizes artificial juridical persons, such as the institution at Dakor, and could not, any more than any other law, support a foundation merely as a means of squandering in waste or profligacy the funds dedicated by the devout to pious uses."

The above observations were made in the case of a public temple. But no distinction can be made between the officers of a public temple and those of a private Debutter. Under strict Hindu Law, only the eldest son is entitled

(1) Savigny System, see 89.

to succeed to a priestly office. But when the office carries with it emoluments, custom has established the rule that all the heirs succeed, performing the duties by turns or *palas* and enjoying the emoluments according to their proper shares as in ordinary heritable property. These *palas* have came to be regarded as saleable and are mortgaged and sold and the decisions of our Courts have recognized the alienations in cases of Shebaits of certain temples, like the Haldars of Kalighat. The alienee may be a stranger. He bears the cost of the Pooja and gets the offering of the day of his *pala* or turn, there being officiating priests paid by salary. But it is difficult to see how custom can make a right alienable, which in its very nature is personal and inalienable. In certain public temples, like that of Gaya, the Brahmins in charge have by long established custom been considered as entitled to the offerings. The Gawals of Gaya have Puranas, describing how the gods gave them that right and how no ceremony is valid without their good services. The fact seems to be that at some very ancient time certain classes of Brahmins or other classes, who came to be considered as Brahmins, were settled by the ruling power to carry on the worship of certain gods. The dynasties which settled them have passed away but the Brahmins remain in charge of the temples. They and the

agents employed by them scour the country for pilgrims whom they escort to these shrines. They oppress them and extort money from them by various means but without their care nobody could have gone and lived in those places in old times and every body finds it difficult to do so even now. They have got their books in which they take the signatures of the pilgrims and once the signature of a man is in the book of a Gawal or other Panda, he and his descendants cannot go to any other Gawal or Panda. These books are sometimes sold and mortgaged and devised away by will. They are the principal property of these persons and it would be to their advantage if they could be alienated. But an alienation to a stranger is impossible in the very nature of the thing. In some cases alienations to members of their own community have been recognized. But how voluntary offerings for voluntary services can be alienable, it is difficult to conceive. Indeed in their very nature, such rights are not alienable. But according to long established custom they are partible. The profits of lands and offerings are enjoyed in shares and in case of pilgrims entered in books, they are divided among the heirs by mutual agreement. This is the true position of all these officers and Pandas of temples. When the true history of those persons is known and their position ascertained, the determination of the law governing

them, which has been considered very confused and difficult, becomes comparatively easy.

Sometimes grants are made to persons of the priestly class quite as much for their maintenance as for the worship of a God. In such cases the beneficial interest should be considered as vesting in the grantee subject to the performance of the worship. There have been many decisions of a conflicting character. In the latest case on the question, Sir Gooroo Das Banerji Justice, held upon the construction of a grant which had been made to a Panda of Baidyanath that though "it is true that the grant in one place says that the village is made Debutter property of the idol" and though "it is also true that the document further provides that if it is discovered that the grantee is neglecting the Sheva worship he will be dismissed", when one looks at the substance of the thing one finds that the enjoyment of the usufract is left with the grantee and his successors for the document expressly says to the grantee, "you, with your sons and grandsons, in succession, will enjoy the aforesaid mouza by carrying on the Sheva worship of the idol Sri Sri Jeu and give me your benedictions three times a day." It was held that "the property was the property of the grantee subject to the performance of certain duties" but the corpus was not divisible as no partition would be binding on the grantor, though

the plaintiff in that case was declared entitled to a third part of the profits, which was his proper share, subject to his carrying on the worship during a third part of the year (1). In this case the personal performance of worship and giving of benediction was required. As personal service was a condition of the grant, it was inalienable, in its very nature.

There are three classes of gifts of Debutter to persons: first, a grant in lieu of the service of worship of an established idol in which case the grant is pure service grant, and ought to be resumable on failure of service; second, a grant to a Brahmin for worshipping in a certain shrine or an established idol for the spiritual benefit of the grantor and the gift is practically to the grantee and his heirs, nominally subject to the worship of the idol; the third is a grant to a Guru or the head of a sect. There are cases in which no personal service is required. A Sheba is set up, in which the worship may be carried on either by the grantee or by a Poojari appointed by him. In case of grants to great Gossains or other Gurus, the worship is ordinarily carried on by Poojaris appointed by them. In these circumstances, if the beneficial interest or any part of the beneficial interest is in the grantee there is no reason why it should not be alienable subject to the burden of bearing the expense

(1) Kulanund *v.* Hansroy, 11 C. W. N.

of the worship, as in the cases of invalid debutters mentioned below.

Debutter is very often created with the object of tying up property. A small portion of the profits is in reality intended for the worship of a God or the performance of religious worship but the major portion is intended to benefit the heirs. In such cases the entire devise is set aside, but the heirs take the property, subject to a charge for the proper worship of the idol (1). A portion of the property may be appropriated, by order of the Court, for the worship under a receiver or to be held by the heirs as mere trustees. The rest of the property can be partitioned and alienated at pleasure. The heirs may have the worship by turns in such cases, though according to strict Hindu Law, it should vest in the eldest male line.

The office of the Mohunt is very different from that of the Shebait of an idol He is the superior of a monastery and his position is similar to that of the abbot of a Christian monastery. We have already seen that after Christianity had become the religion of the old Roman Empire, "dedications for particular churches or for the foundations of churches and religious and charitable institutions were much encouraged.

(1) Ashutosh Dutt *v.* Durga Charan, 5 Cal. 439 P. C. Promotho *v.* Radhica, 14 B. L. R. 175 Piliah *v.* Damodar, 3 Bom. 54. Sonatan Bysack *v.* Sreemutty Juggut Sundaree, 8 Moore 96. Ram Coomar *v.* Jogudis, 4 Cal. 56. Suppammal *v.* Collector of Tanjore, 12 Mad. 387.

The officials of the church were empowered specially to watch over the administration of the funds and estates thus dedicated to pious uses, but the immediate beneficiary was conceived as a personified realization of the church, hospital or fund for ransoming prisoners from captivity." The rector of a church was called, as Blackstone tells us, in England, a parson, "persona ecclesiæ, that is, one that hath full possession of a parochial church. He was called a parson because by his person, the church which is an invisible body is represented." One great difference between the superior of a church or monastery and a Mohunt is that the former is liable to be removed by the head of the Church, whereas the latter is responsible to no superior. Most Mohunts claim that they are responsible to nobody. Of course, they set up claims, like Dalai Lamas, who are supposed to be incarnations of Avolokiteswara. All Mohunts of the Sankara's four Mutts call themselves Sankaracharya, who was supposed to be an incarnation of Siva, who again, some consider, was called by Buddhists Avolokiteswara or Manjusri. Again a Mohunt assumes the position of the Tantrika Guru or spiritual guide, who has the right to implicit obedience of his disciples. All these claims may be conceded. But then he must be a Yati of Sankara's type, one learned and an abstainer from all worldly pleasures and free from

desires of all kinds—a man whose sole occupation is the acquisition of true knowledge and to whom life has no pleasures, death no terrors, heaven no temptations, whose mind is like a mirror in which is reflected pleasure and pain, heaven and hell without affecting it in the least. But if he stands upon this position, he must also bear the necessary burden and that is that the slightest incontinence of itself removes him from the ranks of Yatis and reduces him to the condition of a slave, and that he cannot be the owner of any property, or take any worldly honor or title, nor spend any money on himself. His property consists in his waterpot and two pieces of cloth and books. A Mohunt, who so conducts himself that he can no longer be regarded as a Yati, ceases *ipso facto* from being a Mohunt. He may be a manager or Karbari but can never be a Mohunt, an incarnation of Sankaracharya.

The ideal, of the Mohunt, however extravagant, is good, if it could be realized in practice. But as it is not realized, being now not even understood, the Mohunt cannot and indeed does not, claim the position of the irresponsibility of Divinity. As it is, his position now is no better than of a Superior who has got nobody above him.

The legal position of the Mohunt has been considered in several cases. In a recent case (1) two

(1) Vidyapurna Tirtha v. Vidyanidhi, 27 Mad. 435.

of the most learned judges of the Madras High Court, have after full consideration of authorities laid down that there is a difference between the position of a custodian (or Dharmakurta) of a temple or a Shebait and that of a Mohunt or head of a Mutt. The former is a mere trustee bound to apply the funds at his disposal in carrying out the objects of the trust. The latter *i. e.* the head of a Mutt is not a mere trustee but a corporation sole, having an estate for life in the permanent endowment of the Mutt and an absolute property in the income derived from offerings, subject only to the burden of maintaining the institution.

The Judges say that the object of the Mutts is generally the promotion of religious knowledge, the imparting of spiritual instruction and the propagation of the doctrines of particular schools of philosophy or religion to which they belong. The position of the Mohunt is thus described :

"A preceptor of religion gathers around him a number of disciples whom he initiates into the particular mysteries of the order and instructs in its religious tenets. Such of these disciples as intend to become religious teachers renounce their claims with the family and all claims to the family wealth and, as it were, affiliate themselves to the spiritual teacher, whose school they have entered. Pious persons endow

the schools with property which is vested in the preceptor for the time being and a home for the school erected and mattam constituted." "The ascetics who presided over them were held, owing to their position as religious preceptors and often also in consequence of their own learning and piety, in great reverence by Hindu princes and noblemen who, from time to time, made large presents to them and endowed the Mutts under their control with grants of land. Thus a class of endowed Mutts came into existence, in the nature of monastic institutions presided over by ascetics or Sanyasis who had renounced the world." "The two classes of institutions; *viz.*, temples and Mutts, are thus supplementary in the Hindu ecclesiastical system, both conducing to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge, the presiding element being the deity or idol in the one, the learned and pious ascetic in the other. The position of the head of the Mutt is thus not the same as or analogous to that of managers, *dharmakartars* of *devasthanams* and temples, but resembles more that of Bishops and Archbishops in the Christian system of Europe. In the case of temples, the endowments, whether in the shape of landed property or *tasdic* allowances, have to be devoted to the carrying

out of the specific purposes connected with the temple, *i. e.*, the daily worship and the periodical ceremonies and festival purposes defined and settled by usage and custom and generally recorded in what is known as the "*dattam*" and the *dharmakartars* are mere trustees for carrying out, or executing of such trusts. In the case of Mutts, however, such defined and specific purposes immediately connected with the maintenance of the Mutt as an institution, are, in the nature of things, very limited and a large part of the income derived from the endowment of the Mutt as well as from the money offerings of its disciples and followers, which offerings as a rule are very considerable, is at the disposal of the head of the Mutt for the time being, which he is expected to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion and he is in no way, whether as trustee or otherwise, accountable for it in law. In legal contemplation, therefore, the head of a Mutt, as such has an estate for life in its permanent endowments and an absolute property in the income derived from the offerings of his followers, subject only

to the burden of maintaining the institution. Over the 'corpus' of the endowment, however, his power of disposition is very limited, as in the case of managers of temples and *devasthanams*. He cannot alienate or charge the 'corpus' or the income beyond his own lifetime, so as to bind the Mutt and his successors, except for purposes plainly necessary for the maintenance of the Mutt. And except under such circumstances, an alienation of the 'corpus' or a charge thereon made by him and debts incurred by him will not bind the Mutt or his successors, merely because the same was made or incurred for general religious or charitable purposes appropriate to an ascetic or head of a Mutt. If the decision of this Court in "Sammantha *v.* Sellapa" (2 Mad. 275) is to be taken as a ruling that the debt incurred by the head of a Mutt is binding upon his successors because it was incurred for such purposes, though it was not plainly necessary for the Mutt as such, I am, with all deference, unable to concur in it." (1) The judgment then goes on to say: "It will thus be seen that the property of the Mutt is, like the benefice of a bishopric of the Christian Church, substantially inalienable; the head of a Mutt for the time being has like the Bishop, (*vide* Stephen's Comm., Vol. 2, p. 765. Wall *v.* Naxon (2). Enc. of the Laws of England, Vol. IV.

(1) 27 Mad. 454. (2) 3 Smith 316; 8 R. R. 725.

Tit Ecclesiastical Corporations) subject however to the limited burden of maintaining the Mutt, absolute dominion over the revenues accruing during his life-time."

In the same case Sir Subrahmania Ayyar, offg. C. J. made the following observations: "As to the rights of the Swamis in relation to the Mutts and their endowments, there was on the one hand the cardinal principle of the law of the land that properties given for the maintenance of charities religious or otherwise were ordinarily inalienable, West and Buhler Hindu Law pages 201 and 202. Maharanee Shibeswouri Debia *v.* Mothooranath Acharji (1). Prosonno Rumar Debya *v.* Golab Chand Babbo (2) Narayan *v.* Chintamani (3) and the Collector of Thana *v.* Harisitaram (4), and on the other, the fact that the Swamis were not mere employees or subordinates in the institutions, but heads thereof, whose duty it was to promote the learning and further the interests of religion; such heads however, as ascetics not prone to be affected by motives incident to worldly life, requiring less restraint in dealing with property than ordinary men. It followed therefore, that the law gave them over what remained of the income after defraying the established charges

(1) 13 Moore 274.
(2) 2 I. A. 145.
(3) 5 Bom. 393.
(4) 6 Bom. 546.

of the institutions, a full power of disposition, while in respect of the *corpus* it treated the individuals composing the line of succession as in the position of tenants for life. Baboo Unnoda Pershad *v.* Nil Madhub Bose (1) and Kushalchand *v.* Mahadeo Giri (2)" (3).

The judges further say: "Succession to Mutts is regulated by the custom and usage of each particular Mutt, but in most cases, especially in Southern India, the successor is ordained and appointed by the head of the Mutt during his own lifetime and in default of such appointment, the nomination may rest with the head of some kindred institution or the successor may be appointed by election by the disciples and followers of the Mutt or in the last instance by the Court as representing the sovereign" (4). It is further laid down that the head of a Mutt is not a trustee and does not forfeit his position by reason of his having become a lunatic.

The position of the Mohunt is no doubt analogous to that of a bishop or rector, and his estate may be that of a corporation sole but that does not make him absolute owner during life of the income. In Knight *v.* Moseby (5),

(1) 20 W. R. Cr. 471.
(2) 12 Bom. H. C. 214.
(3) 27 Mad. 439.
(4) 27 Mad. 457.
(5) Ambler, 175.

Hardwicke L. C. say of such a person that "he has a 'fee simple qualified and under restrictions in right of the church but he cannot do every thing that a private owner of an inheritance can." Jessel M. R., in Mulliver *v.* Midland Railway Company (1) observed: "As regards ecclesiastical corporations sole, it was long since decided as to rectors, vicars and others that though in a certain sense owners in fee simple yet in many respects they had only the powers of tenants for life. * * But it was said that being seized in right of their churches, they had not the ordinary powers of other proprietors in fee simple * * * and they were not allowed to use property in the same way as ordinary owners of land." Relying upon these observations the Judges of the Madras High Court held that the estate of the Mohunt was a life estate. With all deference to the learned Judges, it should be observed that an ascetic can hold no property according to Hindu Law and the position of a tenant for life is inapplicable to him as has been held by the Privy Council (2). He has no power of disposal of the surplus income according to his pleasure and his heirs cannot take it after his death.

The head of a Mutt is a "corporation sole," as a bishop is, being like him, "a body

(1) L. R., 11 Ch. D., 611 Al. pp. 622, 623.
(2) Gnanasambandha *v.* Velu, 27 Mad. 69.

politic having perpetual succession and being constituted in a single person, who in right of some office or function has a capacity to take, purchase, hold and demise (and in some particular instances, under qualifications and restrictions power to alien) lands, tenements and hereditaments to him and his successors in such office for ever, the succession being perpetual but not always uninterruptedly continuous" (Grant on Corporations 626. Kent's Commentaries, Vol. 2, p. 274). But in the case of churches it should be observed, that the Bishops, Rectors and Parsons hold their offices subject to the pleasure of the head of the Church. The Mohunt is responsible to no superior. His position is not quite analogous to that of a Bishop. It is governed by the laws and customs of Hindus and it is difficult to define it exactly. The Bombay High Court has in a recent case thus defined his position. They say: "A Mutt like an idol is in Hindu Law a juridical person capable of acquiring, holding and vindicating legal rights, though of necessity, it can only act in relation to those rights through the medium of some human agency. When the property is vested in the Mutt, the litigation in respect of it has ordinarily to be conducted by and in the name of the manager, not because the legal property is in the manager but because it is the established practice that the suit would be brought in that

form" (1). This again is against all legal principles, for established practice cannot give to a person, who has no legal title or right to bring a suit, a right of suit under the Civil Procedure Code. The simple position of a Mohunt as well as of a Shebait is that of a trustee. The Shebait is a trustee for a God. The Mohunt is also a bare trustee. He takes under a trust, the objects of which are the support of ascetics of a particular sect, the maintenance of the worship of a particular God in the case of Vaishnava Mutts, the dissemination of the theological learning of that sect and charity, the devolution of the trust being governed by custom.

I mention charity as one of the objects of Mutts, because it has been so recognized from the earliest times. Sadabrats are invariably kept up by them and charity in its widest sense, as well as education in its general sense should be considered as falling within the scope of their objects, when there is a surplus. The Sanyasis live, for the good of all beings and are trustees in regards to all things in their possession for the good of others. The Madras High Court failed to see that the principles laid down by them would make the Mohunt a trustee and not a life-tenant. No doubt the Mohunts now-a-days arrogate to themselves the position of princes.

(1) Babaji Rao *v.* Lukman Dass, 5 Bom. L. R. 932. See Maharani Shebessourie *v.* Mothooranath, 13 Moore 274. Jogodamba *v.* Puddomoney, B. L. R. 330. Rupa Jagshet *v.* Krishnaji, 9 Bom. 169.

They have their *Gadis* or thrones, they get themselves installed with expensive ceremonies and have themselves called Maharajas. They consider themselves like and even greater than the princes of the Church of the middle ages in Europe, and not accountable to anybody, a position to which the princes of the Church could not aspire, as they were subordinate to the Pope of Rome. But all this has no place in Hindu Law. The Mohunts may call themselves Maharajas, because they, in theory, are above all worldly pursuits and affections. They also call themselves Sankaracharyas and Ramanujas and the like, probably because in imitation of the Buddistic Lamas, they think they are incarnations of those great teachers whose seats they so unworthily fill. But all this is opposed to Hindu ideas. Paramhansas do not reincarnate.

The position of the Madras High Court that a Mohunt does not forfeit his right by becoming a lunatic is wholly inexplicable and shows to what unreasonable conclusions, it leads to.

A Mohunt, as a Sanyasi, cannot hold property and as such, the disqualifications which exclude from inheritance do not apply to him. But the true position of a Mohunt as a successor of Sankara or Ramanuja is that of an Acharya, a teacher or Guru. It would be absurd to say

that a lunatic, an idiot, one of weak intellect, or one who is deaf-mute or blind can be a Mohunt.

A leper or one subject to epileptic fits or a pangu or one subject to consumption or other incurable disease is a *patita* according to Hindu Law and cannot be a teacher. He may be a Sanyasi but not an Acharya. One physically and mentally helpless cannot be a Mohunt. A moral leper also, cannot be a teacher. Incontinence makes a Sanyasi fall from his high estate and so does other immoral and criminal acts. A vicious person, a drunkard and a criminal cannot be a Mohunt. In Madras, it has been held that a Mohunt outcasted and excommunicated forfeits his office.

With a Mohunt, unlike an ordinary owner of property, whatever disqualifies from succession, is a cause for forfeiture and removal. A lunatic cannot continue to be the Acharya of a Mutt, nor a leper. A Mohunt, who takes to vicious or immoral life, ceases to be an Acharya. The simple rule is that when a person becomes physically or mentally helpless or becomes unfit by immorality ceases *ipso facto* to be an Acharya and a Mohunt. The loss of a limb not involving utter incapacity is not a disqualification or a cause for forfeiture. The qualifications of a Guru of Yogis are a perfectly strong and healthy body, learning, a mind serene and peaceful,

fearless and merciful, and perfectly moral conduct. This is the ideal. We have not to deal with ideals. But whatever incapacitates or makes a person unfit to be an ordinary teacher certainly disqualifies in the case of an ascetic Acharya.

A Mohunt could not, in ancient times, and cannot now, in any way, alienate Mutt property. The only possible case in which a part of it could and can be alienated is that of the extreme necessity of parting with a part for preserving the whole. The support of the Sanyasis could never be a justifying necessity for the alienation of Mutt property. The profits of such property, so far as they go, may be appropriated for that purpose, or for the purposes of repairs &c., but the corpus was never meant to be alienated for that purpose and is wholly inalienable by the Mohunt or any other person. That being settled what are the powers of the Mohunt. He has the power to settle the sleeping quarters of Sanyasis and to arrange for what is called in Northern India their *Chipi* or the scanty food of a Sanyasi. A Mutt has got Sanyasi officers for all purposes. It has got a Karbari or manager, a Bhandari of store-keeper, a defrayer of expenses, and an officer who distributes the *chipis*. The Mohunt seldom interferes with these officers but he can do so, if he likes. He appoints them and can dismiss them, but finds it very difficult to dismiss without just cause, as these officers by

long established custom consider themselves entitled to remain in their offices, as long as they wish, like the Mohunt himself. But the power of the Mohunt to dismiss them is undoubted.

The Mohunt has every right to spend the income of Mutt property for charitable purposes, more especially for the spread of learning. He cannot set up idols, for Yatis do not worship any gods. By stretching a point, they may set up the worship of Shiva. But the setting up of many temples to many gods and appropriating money for their worship could never be the proper work of Yatis. But in modern times, the Mohunts, like other rich men, set up many temples and many idols and appropriate money for their worship. These Sanyasis who are mostly ignorant of the Shastras have forgotten that they are there, because they are supposed to be above all minor gods and are called Maharaj—a title of which they are fond—not because they are kings but because they are possessors of all things, being above all want and law and above all men, as they have no desires. A Mohunt cannot spend a single pice on his own pleasure or the gratification of his own vanity.

In mediæval times, the congregation might turn out a licentious Mohunt by force. A Hindu king had the right to reduce to slavery a Sanyasi, who was guilty of conduct like that

of worldly men such as incontinence.* A Hindu king had thus great controlling powers over all Mohunts. Now let us see the present condition of Mutts.

Early cases have established the rule that as regards public endowments, the office of the Shebait is indivisible. (1) Similarly the office of the Mohunt is indivisible and it is so, in its very nature. The Privy Council have in a recent case held that "an assignment by the Mohunt or Shebait or manager of the right of management is beyond his legal competence according to the common law of India." (2)

It was at one time thought in Bombay and Madras, that the estates of Shebaits and Mohunts and their successors are successive life-estates. (3) But the Privy Council, in a recent case, have overruled those decisions and held that "no distinction can be made between the office and the property" and that there can be no successive life-estates in such cases. Indeed the position of these persons is that of a trustee pure and simple.

It has been repeatedly held from the earliest times that the right of management is

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* राज्ञ एव हि दासः स्यात् प्रव्रज्यावसितो नरः। Narada.

(1) Trimbak *v.* Lakshman, 20 Bom. 495. Maharanee Shibessawari Debia *v.* Mothuranath Acharya, 13 Moore 273.
(2) Raja Varma *v.* Rabi Varma, 4 I.A. 83.
(3) Trimbak Buwa *v.* Bhan, 7 Bom. 188.

res extra commercium, indivisible and inalienable. (1) It is undoubtedly an inflexible rule but certain rulings have allowed a modification of it to the effect that the office may be held by turn. This modification is equitable, when there are emoluments attached to the office intended originally for the whole family, as we have seen before. However, as it now stands, the rule is correctly laid in the case of Trimbak *v.* Lakshman where the Judges say : "According to Hindu text-writers as regards public endowments, religious offices are naturally indivisible though modern custom has sanctioned a departure in respect of allowing the parties to officiate by turn and of allowing alienations within certain restrictions." (2) The Madras High Court in a recent case have held that it is competent for co-trustees of a public religious institution to settle by arrangement among themselves a scheme of management by each of the co-trustees in rotation, whether emoluments are attached to the office or not. Such a scheme ought to be upheld, as being an equitable and proper arrangement, by a Court under Sec. 539C. P. C., but it is only subsidiary to the interest of

(1) Srimati Mallika Dasi *v.* Ratan Mani, 1 C. W. N. 493. Jaggat Mohine *v.* Sookheemonoy, 17 W. R. 41 P. C. Mancaram *v.* Pranshankar, 6 Bom. 298. Drobo Misser *v.* Srinibash, 14 W. R. 409. Jaggunath *v.* Kissen Prasad, 7 W. R. 266. Kalee Charan Gir *v.* Bungshee Mohun, 15 W R. 339. Gurakul *v.* Doraṣami, 6 Mad. 76. Narasunma *v* Anantha, 4 Mad. 391. Rajaram *v.* Gonesh, 23 Bom. 131. Algappa *v.* Sivarama Sundara, 19 Mad. 211.

(2) Trimbak *v.* Lakshman, 20 Bom. 495.

the institution and ought to be set aside, when it is injurious to the trust. (1)

Indeed, it has been held, in all the Presidencies including Bengal, that though the right of the Shebait or Mohunt is inalienable and indivisible, but for convenience, when there are more trustees than one, the trustees may take the management by turns, when the trustees have a pecuniary interest in the offerings or when a property is owned by several persons, subject to a charge for the worship of an idol. It has even been held that it is incumbent on the Court in a declaratory suit "to define the precise periods" during which the parties should carry on the worship. (2)

But it has been held that all these arrangements though, they may be good, as between the Shebaits for convenience, are not good against the trust and it has also been held that an agreement to bind successive Shebaits to a particular mode of management is invalid.

It is difficult to appreciate the logic according to which an arrangement or an agreement may be binding on the co-trustees and yet may be bad as regards the trust. As regards public temples and endowments, ignorance of their history and original constitution has led to this

(1) Ramanathan Chitti *v.* Muragappa Chitty, 13 Mad. L. R. 341.
(2) Ramsoonder *v.* Taruck Chandra, 19 W. R. 28. Limba *v.* Rama, 13 Bom. 548. See 22 W. R. 437, 20 Bom. 495.

confusion of the law. Persons who claim to be Shebaits were not Shebaits but Acharyas, Poojaries or other Paricharakas. It would be absurd to consider the descendants of the person, appointed according to the rules of the Smritis as gatekeeper, as trustees. The trustee originally was the State which set up a temple, the others were only servants paid for their services. In case of private individuals also, these were all servants the trustee, if any, being the donor and his descendants. The State and the families that set up these temples have all disappeared in course of time but the Poojaries and the Paricharakas remain and now set up a claim of ownership.

This brings us to the question of the right to the offerings. According to the idea of the ancient Hindus, as we find in the Upanishadas, (1) whatever is offered to the gods is enjoyed by all beings. But as a matter of fact all offerings are taken by the officiating priests, (2) and because they do so, they are according to the Smritis, outcaste, not being entitled to invitations in Sraddhas. But their right is unquestioned. That is the ordinary rule where the image is thrown away after worship. But in case of great public temples, when rich offerings of ornaments, gems or furniture are made by votaries, they are meant to be preserved for the use of the idol and it is

(1) See p. 27. (2) See p. 27.

desired that they should be put on the idol on certain occasions. The priest or the Panda can have no claim to such offerings. Again the ordinary money offerings for Pronami or obeisance were gifts to the deity but have come to be regarded as the perquisites of the officiating priest. As regards public temples the Mohunt or the Shebaits employ Poojaries on salary and take the offerings or charaos. But the Mohunt or the Shebait of a temple as such can have no personal interest in such offerings. He is a mere trustee. The idea of a deity receiving and saving money for the rainy day is rather amusing and has no place in ancient books. However, the decision of the Calcutta High Court to the effect that these offerings are meant for the maintenance of the shrine may be considered correct under modern circumstances. But whether they are intended for the maintenance of the Shrine or not, the Mohunt or the trustee has no right to it, and they cannot form the subject of an *ekrar* or agreement by him and cannot be seized in execution, except when the alienation is made for the necessity of the temple. (1)

We have already seen that all Debutter and all property belonging to religious institutions are inalienable. In the southern parts of the Bombay

(1) Girijanund *v.* Sailajanund, 23 Cal. 645. Monohur *v.* Lakshmiram, 12 Bom. 247 Affd. 26 I. A. 199.

Presidency, they have been made expressly inalienable by Act II of 1863. We have seen how there can be no necessity justifying an alienation of the corpus of dedicated property. The correct rule was laid down by the Bombay High Court in an early case (1), in which it was held that that a Hindu religious endowment can never be sold or permanently alienated, though its income may be temporarily pledged for necessary purposes. But in more recent cases, the same Court have held that not only grants of a permanent character if made for necessary purpose by a Shebait or manager, are valid against his successor but that grants made without necessity are good during the lifetime of the grantor(2). The latter proposition is clearly incorrect. The Calcutta High Court have rightly held that alienations without necessity are wholly void.(3)

It has also been held in the case of a priestly office with emoluments attached to it, that it is wholly inalienable and the holder having mortgaged his right to a Pala or turn of worship can himself plead its invalidity against the mortgagee (4). In another recent case a mucurreri lease granted by a Shebait without

(1) Collector of Thana *v.* Hare Sitaram, 6 Bom. 546.
(2) Ram Chandra *v.* Kashinath, 19 Bom. 271.
(3) Prosonnoo *v.* Saroda, 22 Cal. 989. Juggut Mohun *v.* Sokeemoney, 17 W. K., 41 R. Goluk Chunder *v.* Raghoonath, 17 W. K. 444. Narayan *v.* Chintamun, 5 Bom. 393. Rangasami *v.* Kanga, 16 Mad 146. Gnana Sambada *v.* Velu, 27 I. A. 59.
(4) Srimati Mallika Dasi *v.* Ratan Mani, 1 C. W. N. 493.

necessity to a co-Shebait of the part of the Debutter property which be held under an arrangement with his co-Shebaits, taking upon himself the liability to perform the worship according to *pala*, was held to be wholly invalid. The rights under the so called partition were held to be only rights of occupation, management or custody, which could not affect the inalienable character of the endowment. But for reasons difficult to understand, the possession of the lessee was not disturbed in that case (1). In certain cases, in Bombay and Madras, it has been held that it is competent for a Shebait or the holder of a priestly office to alienate his interest to a co-Shebait but not to a stranger.

In the case of private debutter, it has been held that the "consensus of the whole family might give the estate another direction". It has also been held that the gift of an idol and its property by the members of the family whom it belongs to another family for the purpose of carrying on the worship, if made for the benefit of the idol is valid(2). The proviso "if made for the benefit of the idol" assumes that there is an idol which requires a benefit. If it is merely a stone or wooden image, its benefit reminds one of Isaiah Ch. 44. But to the Hindu an idol is a representation of the deity who confers benefits but cannot

(1) Prosonno *v.* Saroda, 22 Cal. 989.
(2) Khetter *v.* Hari, 17 Cal. 557. See 12 Cal. 341.

receive any. Private debutter means property dedicated for carrying on the worship of the family god. The family are the Shebaits or trustees. All the trustees may give up their own office and appoint others in their places but certainly not for the benefit of the idol. It must be for the benefit of the substituted trustees who would never take it, unless they expect to derive some profit out of the transaction.

The powers of a Shebait are supposed to be similar to those of the guardian of a minor and the principles of Hanooman Prosad Pandey's case apply to any debts incurred or alienation made by him. It has been held that he can make partial alienation "for the service of idol and for the benefit and preservation of its property", for the expenses of litigation affecting the property, the repairs of buildings and other purposes of urgent necessity (1). The law is thus laid down by the Privy Council in the case of Prosonno Kumary *v.* Golab Chand: "notwithstanding that property devoted to religious purposes, is as a rule inalienable, it is in their Lordships' opinion competent for the Shebait of property dedicated to the worship of an idol in the capacity as Shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship,

(1) Prosonno Kumari *v.* Golab Chand, 2 I. A. 145. Sheo Shunker *v.* Ram Shewak, 24 Cal. 77. Prosonno Kumar Adhicari *v.* Saroda, 22 Cal. 989. Parsotam Gir *v.* Dat Gir, 25 All. 296.

repairing the temples or other possessions of the idol, defending hostile litigious attacks and the like objects, the power, however, to incur such debts must be measured by existing necessity for incurring them."

The legal necessity in the case of a Shebait is very different from the legal necessity of a widow or *kurta*. The Shebait is a trustee for the performance of the worship of an idol from the profits of property dedicated for the purpose. His powers must be measured by the object of the trust. It follows that he cannot sell or create a charge on the property for the expenses of the worship. He must, however, repair the temples as otherwise the worship would suffer and may cease altogether. But for that purpose he can only alienate a portion of the property, the parting with which would not affect the meeting of the expenses of regular worship from the remaining properties. As regards expenses of litigation, he can make alienations for meeting them, when there is no other way of preserving the property. Similarly, the payment of rent or revenue or other such demand is a valid necessity, when it cannot be met otherwise from the profits and only in years of scarcity. The expenses of litigation for the removal of a dishonest trustee or for the recovery of alienated debutter property may also be a charge on the property, provided they are clearly for the benefit of the

endowment. But in all these cases, as the Judges of the Punjab Chief Court observed, in a recent case, "it is not sufficient to show that there was a necessary purpose. It must be shown that such purpose could not be fulfilled except by contracting the debt and that the ordinary income of the endowment was not available or was insufficient for them and that the debt could not be discharged from the income." (1)

It is incumbent on a purchaser or a mortgagee to make proper enquiry as to the necessity. In the case of endowments, the necessities mentioned above are of such a character that they must be patent to a *bona fidæe* enquirer and there can be little doubt or mistake about them. The burden on the creditor therefore must be heavier because there can be little mistake about the facts and higher because there is little chance of being misled in the case of Debutter, than in the case of dealing by a widow, kurta or guardian of a minor. It has been held that when the creditor or purchaser had notice that the whole of the mortgage or purchase money was not required for the purposes of the endowment, the transaction was not altogether void, and the creditor or the purchaser was entitled to be reimbursed so much of the money as had been legitimately advanced (2).

(1) Kashiram *v.* Bawatola, 3 Punjab 227.
(2) Durganath Roy *v.* Ram Chandra Sen, 4 I. A. 52, 2 Cal. 341.

The powers of a Shebait, however, cannot be less than the powers of a manager or steward of a master who is always absent. His powers are those of a trustee and he can give temporary leases or make such other arrangements without alienating the property, as may be necessary for good management. It has been held that a widow can give a quarrying lease, work, mines or cut timber without accounting for them. There is no reason why a Shebait cannot do all those acts, provided he strictly accounts for them and invests the money thus realised in such manner as may be profitable to the endowment. But who is to take an account from a Shebait? The difficulty is the same in the case of the proper appropriation of the ordinary rents and profits as in the case of the extraordinary profits. It has also been held that a Shebait can grant a valid Putni lease for necessity (1).

In cases, coming under the operation of the Bombay Act II of 1863, the Mohunt or manager is prohibited by law from making an alienation. But in the other provinces and in other cases there is no such prohibition, and for necessary purposes of preserving or maintaining the endowment, it has been held, that the Shebait or Mohunt can make an alienation. (2) In Bombay, it has

(1) Tayabunissa *v.* Sham Kishore Ray, 7 B. L. R. 621.
(2) Parsotain Gir *v.* Dat Gir, 25 All. 296.

been held that grants of a permanent character are not void if made for a necessary purpose, the grantee having the right to hold it during the life-time of the grantor though such grants are not binding on his successor.(1) It is difficult to see how such grants can be of any effect at any time in respect of endowed property.

All purchases and acquisitions made by a Mohunt are always the property of the Mutt. In Madras, it has been held that there is a presumption to that effect. (2) It can not be otherwise, for the Mohunt can have no property of his own.

The position of the Mohunt or superior of a religious establishment is to some extent different from that of a Shebait. He is not, like the latter, a trustee for carrying in the worship of an idol. He is a trustee, the object of the trust under which he holds, being the maintenance and shelter of Sanyasis, who are either his immediate disciples or the disciples of his predecessors or the disciples of such disciples, during the continuance of proper conduct in order to enable them to carry on literary labours and to be engaged in meditations of the Supreme Being, and the advancement of the learning and religion of his sect and lastly, charity.

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(1) Ramchandra Shankarbava *v.* Kashinath Narayun Dravid, 19 Bom. 271.

(2) Ramakishore *v.* Tarathumbul, 12 Mad. L. J. 438.

In no case can any part of the endowed property be alienated. The income of the property only was intended for the objects mentioned above and if it is not sufficient, the Sanyasis should beg and not sell the property. The only case in which a part of the property may be alienated is that of repair of the monastery or the preservation of property from destruction for non-payment of rent or revenue on account of inability to meet such demands in years of scarcity, or an account of hostile attacks of litigious persons. The expenses of litigation for the removal of a dishonest Mohunt or for the recovery of endowed property alienated by a Mohunt or wrongfully taken by a third party may also be a good charge on the property, provided such litigation is for the benefit of the endowment. It has been held that the powers of a Mohunt are similar to those of a Shebait (1). But it seems to me that the rules about the powers of and alienations by Shebaits should apply to Mohunts, subject to the modifications indicated above, as the objects of the two trusts are different.

Now a very difficult question arises. Only a very small portion of the immense wealth which has accumulated in the hands of Mohunts on account of savings of hundreds of years and also on account of the superior prudence and worldly

(1) Parsotamgir *v.* Datgir, 25 All. 296.

wisdom of the Sanyasis is required for their needs. What is to be done with the rest? The number of Sanyasis of the richest establishments are few in number and growing fewer every day, as becoming a Sanyasi is rather unpopular in these days of western education. The maintenance of the establishments costs little. All religious and charitable objects may come within the purview of the trust. The maintenance of Sanyasis other than the disciples of the establishment may also be considered a proper object for which money may be spent. It would be a good day for the country when the Mohunts spend their vast wealth not in debauchery and in Bhandaras, which excel in the lavishness of expenditure the Sradh or the installation ceremony of princes, but in charity to all beings, as true Sanyasis ought to do. But how can the law control these Mohunts?

In Assam, the grantors of some endowments retain a certain amount of power in their hands. It has been held that the high priest of an endowment in Assam, who is a nominee of the grantors has no power to grant a lease in his own name.

The next question we have to deal with is, whether a Mohunt or Dhurmkurta of a temple can dismiss hereditary officers and servants of the temple. According to the old rules, as long as as they performed their duties properly and did not disqualify themselves from such performance

by their acts, they could not be dismissed, at least, they could not be deprived of their perquisites and the property allotted for their maintenance. It has been held however, that whether these officers and servants can be dismissed or not depends on circumstances and proof of custom and that whether there was a sufficient ground for dismissal is one of degree and not of principle and depends upon the circustances of each case. (1) It would be unreasonable to say that they could not be dismissed, if they neglected to perform their services or became disqualified by their conduct from the performance of such services.

It is often a matter of great difficulty to ascertain the relative positions of the Mohunt of a Mutt and those of Mutts dependent on it. We have seen that the Sanyasis of a Mutt sometimes set up independent Mutts but still owning allegiance to the superior Mutt. The Mohunts of superior Mutts in such cases always try to exercise controlling powers over these Mutts. Such claims lead to serious disputes and often to litigation. If the claims of the superior Mutt be allowed in all cases, all the Mutts of India should be under the control of the original Mutts established by Sankara. Indeed such claims are clearly unsustainable. It is however, equally clear that, when a Mohunt establishes branch

(1) Kristna Sami *v.* Gomatam, 4 Mad. H. C. 63.

Mutts called Murhis and places them under Sanyasis subordinate to him, his powers of control over them should be absolute. But in many cases, a Sanyasi installed as Mohunt of a Murhi takes Chelas to himself and is succeeded by his Chela on his death. Supervision by a superior Mutt over a subordinate and distant Mutt is always lax, and in course of time many of these subordinate Mutts assume an attitude of independence and come to be regarded as wholly independent. But as long as they do not attain to this position, the superior Mohunt must possess a certain power of supervision over them—such powers being often regulated by custom.

In the case of Giyana Sambandha *v.* Kandasami (10 Mad. 375), very complicated questions about the rights of superior and subordinate establishments were raised. That was a suit brought by the head of a Sudra establishment called Adhinam against another person in possession of a Mutt, which it was alleged was subordinate to it, for declarations that the latter was subject to his control, that he was entitled to appoint a manager for it and that the defendant's nomination by his predecessor was invalid. The chief Adhinam was that of Dharmapuram. Mutts had been established at various places in Madras. Benares and Nepal by the ascetics called Tamberans of the principal

Adhinam and many of them claimed independence. This case was an attempt on the part of the head of the Dharmapuram Adhinam to establish the dependence of the others. In the matter of their particular Mutt or Matam, it was held, that it was affiliated to the Adhinam but the head of the Adhinam was not entitled to appoint the head of the former and to get an order of delivery of possession of the property of the Mutt to such appointee. It was also held that the head of the subordinate Mutt was entitled to nominate his successor from among the members of the Adhinam and that the head of the Adhinam was entitled to see that the rule was enforced, though he could not invest a disciple not properly nominated by the head of the Mutt (1).

Lapse of time always makes the claims of superior Mutts assume a shadowy character. Whatever might have been the custom in former times, Murhis or subordinate Mutts, the management of which is not controlled by the superior Mutt have come to be considered independent to all intents and purposes.

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(1) Giyana Sambandha *v.* Kandasami, 10 Mad. 375? See Kashiboshi Ramling *v.* Chidumbernath, 20 W. R., 217 P. C.

LECTURE XII.

Shebaits and Mohunts—Succession.

Under ancient Hindu Law, Debutter property always went to the eldest son. Succession to the office of Shebait should be governed by the rule of primogeniture. All priestly offices were also in ancient times taken by the eldest son. In course of time, it was thought that emoluments for priestly services, which were once considered to be indivisible should be divisible. Katyayana, having an ancient text of Vrihaspati before him, which is now lost to us, says that according to Vrihaspati, they were indivisible. But the extant text of Vrihaspati combats the position of their indivisibility and says that without much consideration they have been declared indivisible by some. It shows that custom in very ancient times had made such emoluments divisible. Thus came into existence the practice of dividing Yajmans or persons who require priestly services, of officiating by turns at temples &c., and of dividing the emoluments in accordance with shares by all the heirs.

It was considered at a time, that only male

descendants could succeed to priestly offices. But we find now at temples and also, among ordinary priests, that daughter's sons succeed to such offices and widows and daughters take the emoluments attached to the office, carrying on the duties by employing other persons. But this is carrying the rights of females too far, according to Hindu ideas, as a female cannot perform the worship of deities. It has been held that failing males, females may succeed unless the office requires the discharge of duties, which a female is incompetent to perform. But there is no priestly duty which a female can perform (1). But it is true nevertheless, that in Bengal, at least among Vaishnavas, and sometimes even among Saktas, widows and daughters of a deceased Guru or guide succeed to his office and perform his duties. But this is an innovation. It has therefore been rightly held by the Privy Council that a Hindu widow cannot succeed to the office of a Shebait or to any other priestly office without proof of custom. (Jankee *v.* Gopal, 9 Cal. 766). This certainly cannot cover the cases where certain properties are dedicated for the worship of household deities and are taken by the heirs as Shebaits. In these cases, females, whenever they succeed to the family property, also take the Debutter.

(1) Joydeb Surma *v.* Haroputty, 16 W. R. 282. Mujabar *v.* Hossen, 3 Mad. 93. Janki *v.* Gopal, 10 I. A. 32, 9 Cal. 766.

Succession to the office of a Shebait or trustee for a religious or charitable trust is regulated by the terms of the deed, when there is one, by which it is created. When there is no provision in the deed or when there is no deed or oral disposition, the office devolves on the heirs of the grantor(1). Indeed, it has been held that when the worship of a *thakoor* has been established, the Shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or that there has been some usage or course of dealing to show a different mode of devolution (2). When also the succession, as laid down in the deed, fails, or where the deed is silent, the office devolves on the heirs of the founder (3).

We next go to the consideration of the law of succession of Mohunts. According to the rule of Yajnavalkya, the heir of a Yati is his disciple, that of a Vanaprastha is his spiritual brother and that of a perpetual student is his preceptor. Now it is clear that this did not refer to the princely properties of Mutts. It referred to the sandals, books and the scanty clothes of men who by law could

(1) Gnanasambandha *v.* Velu Pandoram, 27 I. A. 69, 23 Mad. 271. Janki *v.* Gopal, 10 I. A. 36, 9 Cal. 766. Jagannath *v.* Ranjit, 25 Cal. 369. Goswami Sri Giridhari *v.* Raman Lalji, 16 I. A. 137. Peet Kunwar *v.* Chutterdhan, 13 W. R. 396.

(2) Goswami Sri Giridhari *v.* Raman Lalji, 16 I. A. 137, 22 Cal. 843.

(3) Hari Dasi *v.* Secretary of State, 5 Cal. 228 P. C. Peet Keomoar *v.* Chuttardhuri, 13 W. R. 396. Phati *v.* Damodar, 3 Bom. 84.

hold no property. However, the Sanyasis consider that they are all Yatis and their disciples are their heirs in respect even of Mutt property. They consider their Chelas as sons and thus entitled to succeed in preference to every body. They have cut off all connection with their natural family upon which they have no claims and which has no claims on them. The direct disciples are their sons; the disciples of their Gurus are their brothers, and the disciples of their Gurus' Gurus are their uncles, and so on. They have thus a regular genealogy for their purposes. The direct disciples come first, and failing them, those that would succeed if the Sanyasi genealogy were a true genealogy and the ordinary rules of inheritance applied. The idea is a creation of the fancy of the ignorant in these latter days, when Sanyasis are equally ignorant of the Sruti or the Smriti.

Buddha laid down the rule that the oldest Bhikshu should be the superior, but if he was not learned, the most learned could be appointed by election. As a matter of fact, however, a superior always nominated his successor. The Buddhistic rule was thus practically that the superior was nominated by his predecessor. We know how Mahakasyapa was nominated by Buddha on his death-bed in preference to Ananda whom he loved best. But it is clear that such nomination, unless it fell on the most learned and

saintly of Bhikshus was of no effect, for the authority of a teacher depended on his reputation for learning and virtue. Bhikshus and the public would gather round the holiest among the Arhats, whether he was the superior of an establishment or not. Thus, though there was no regular election, the superior had but little choice except to nominate the person most revered by the congregration. There however, does not seem to have been any instance of holding large properties by a monastery. The Bhikshus lived by begging; and favouritism and canvassing as motive powers had little influence over the minds of men, who lived a truly ascetic life and whose great ideal of life was to get rid of all human affections. When immorality and worldly motives got hold of the minds of Bhikshus, then only did questions about succession arise. Nomination was the rule followed, though it did not always lead to the appointment of the holiest. Among Buddhists however, the disciple had no preferential right, the oldest and the holiest—a man who was supposed to be an Arhat was always selected. Indeed it appears that Buddhists had a predilection for very old men as teachers. They looked like Arhats and were regarded as such.

Among Hindu Sanyasis however, the Smriti text of Yajnavalkya about disciples succeeding teachers had unquestioned authority. There is

no doubt that the first Mohunts of the ten orders founded by Sankara were all nominated by him. These Mohunts also followed his example in nominating their own successors in the first place from among their disciples. But as a Guru had undoubted power to expel or disown any disciple, he could not be said to be under an obligation to nominate a disciple, if there was no one worthy of the office, nor is it reasonable to suppose, that a Chela or Shisya could impiously question the act of the Guru in nominating his successor. It is supposed by some that the Bhandara and the Chudder ceremony show that there was originally some system of election. This is a mistake. These Sanyasis, when they became very wealthy arrogated to themselves the position of kings especially as they were all called Maharajas by all Hindus, who supposed them to be as independent as kings, being above all worldly things. The Mohunts performed the Bhandara in imitation of the Sradh of the rich and feasted all the Sanyasis of the neighbourhood with a lavishness of expenditure equalling that of kings and on the same day they had their own formal installation ceremony, like the Abhishekha of kings, performed. The Chudder ceremony is only a social function. The invited Sanyasis, as is usual in ordinary invitations, presented *chudders* out of courtesy and in recognition of the fact of the installation of the host.

Nomination was the original rule but in recent times, the Sanyasis of an establishment sometimes claim the right of election. There are certain Punchaiti Mutts, like the Naga Mutts at Allahabad and the Punchaiti Mutts of Benares and Hurdwar, which have Mohunts but are quite democratic institutions, in which the Sanyasis all claim some kind of right and participation in the management.(1) These Sanyasis introduced some sort of election. But in the true Sankara Mutts such practices were seldom resorted to. On failure of nomination, it is possible, that though the first-made Chela had a preferential right, the Sanyasis of an establishment exercised some sort of a right of election of a successor to the deceased, from among his Chelas, in the first instance, and failing them, among those, who would be his heirs according to Sanyasi genealogy. Mr. Wilson thus describes the mode of election to Mutts: "The Mutts of various districts look up to some one of their own order as chief and they all refer to that connected with their founder as the common head. Under the presidency, therefore, of the Mohunt of that establishment, wherever practicable, and in his absence, of some other of acknowledged pre-eminence, the Mohunts of the different Mutts assemble, upon the decease of one of their brethren, to elect a successor. For this purpose, they

(1) Parsotam Gir *v.* Dat Gir, 25 All. 296.

examine the chelas or disciples of the deceased, the ablest of whom is raised to the vacant situation : should none of them be qualified, they choose a Mohunt from the pupils of some other teacher, but this is rarely necessary, and unless necessary, is never had recourse to. The new Mohunt is thus regularly installed and is formally invested with the cap, the rosary, the frontal mark or Tika or any other monastic insignia by the president of the assembly. Under the native Governments—whether Muhammadan or Hindu—the election of the superior of one of these establishments was considered as a matter of sufficient moment to demand the attention of the Governor of the province, who accordingly in person or by his deputy presided at the election. At present no interference is exercised by the ruling authorities, and rarely by any lay character, although occasionally a Raja or a Zemindar to whose liberality the Mutt is indebted or in whose lands it is situated assumes the rights of assisting and presiding at the election" (1). Mr. Wilson's opinion was the prevailing opinion among English lawyers at one time, in this century. Very early during this century, the Courts recognized the power of election of their Mohunts in certain cases by the Sanyasis of the Mutts of their order.(2) As regards Byragi

(1) Wilson's Hindu Religions, pp. 25, 26.

(2) Mohunt Gopal *v.* Kerparam, S. D. 1856, p. 250. Narain *v.* Brindabun, 2 S. D. 151. Gossain *v.* Bissessur, 19 W. R. 215. Madho *v.* Kaintis, 1 All. 539.

Mutts also, it was held in Agra, that ordinarily the successor was appointed by the Mohunts of other Byragi Mutts. Ramdass Byragee *v.* Gunga Dass, 3 Agra 295.

As we have seen above, the idea prevailed in the beginning of this century that the office of the Mohunt was essentially elective. But how was election to be carried out? In a case of Vaishnavas, when the plaintiff claimed to be a Mohunt on the ground of nomination and installation at the obsequies, the Sadar Dewani Adalut directed an assembly of Mohunts to be convened for the purpose of electing a Mohunt (Gunga Dass *v.* Telak Das, 1 Macn., p. 309). In 1815, it was held that the office of Mohunt or Superintendent of a Hindu religious establishment having been by usage elective, such usage must be adhered to, in preference to any other mode of succession and that a relinquishment or devise by an incumbent in favour of another person could not operate further than as a nomination which to avail must be confirmed by the usual mode of election (1 Mac. 51). But this jurisdiction of the Court to order an election was questioned by the Privy Council in the case of Gridharee Das *v.* Nundkishore where their Lordships make the following observation: "Supposing we thought the election of the present defendant an improper one what authority have we to direct a new election" (11 Moore 431. (1). Since then however, in several

(1) See Marshall 588.

cases, the Calcutta High Court have ordered election by laying down the mode of it.

It is now settled by the decisions of Courts that in every matter concerning a Mutt, including succession, the custom governing the particular establishment has to be proved. (1)

We have already seen that nomination was the original rule. It has been held that when there is a Chela who is an ascetic no other person can succeed to a Mohunt. (2) The Courts have held that, as a rule, the custom, that prevails is that the Mohunt nominates his successor by word of mouth or by a will (3). When there is no nomination, one of the Chelas is elected by the Sanyasis (4). Failing a Chela a Gurbhai (5) or other spiritual relation may be elected or may succeed, when there are no Sanyasis to elect. In a recent case, the Judges said "in some Asthals, the succession depends upon election from amongst the Chelas by the superiors of other similar Asthals. The reigning King has occasionally the

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(1) Ramesvaram Pagoda, 1 I. A. 209. Greedhary *v.* Nundkishore, 11 Moore 405. Janaki *v.* Gopal, 10 I. A. 32. Raja Vurma *v.* Rabi Vurma, 4 I. A. 83.

(2) Mahant Ramji *v.* Lacha, 7 C. W. N. 145. See 9 All. 1, 22 Cal. 843, 9 Cal. 766, 5 W. R. 59, 1 S. D. A. 278, 6 S. D. A. 262.

(3) The case of Puttige Swami (*vide* Appeal No. 66 of 1881) cited with approval at 27 Mad. 446.

(4) Mahanth Ramji Das *v.* Lucchu, 7 C. W. N. 145.

(5) Bhagaban *v.* Ramanuj, 22 Cal. 843 P. C Ganesh Gir *v.* Umras Gir, 1 S. D. A. 291 (1807). Mohunt Ramnujy *v.* Mohunt Debraj, 68 D. A. 262. Mohunt Sheo Prokash *v.* Mohunt Joyram, 5 W. R. Mis. 57.

right to elect from among the Chelas of the last Mohunt" (1). The claim is sometimes made by the Mohunts of neighbouring Mutts to elect the Mohunt of a Mutt. But there seems to be little foundation for this claim. Again neighbouring Mohunts or Mohunts of similar Asthals are a very indefinite number. What constitutes neighbourhood in such cases? What are similar Asthals? All Sankaracharya Mutts, which are very numerous and which are scattered throughout India, are in one sense similar Asthals. Even the Asthals of any one of the orders, say those of the Puris, are too numerous and too scattered for the purposes of an election by their superiors. Election ought to be by the Sanyasis of an institution and not by outsiders. But one thing must be borne in mind. Originally all Mutts were dependent on the great institutions founded by Sankara and the superiors of those institutions exercised the right of nomination. But in course of time, many Mutts were set up by solitary, capable and ambitious Sanyasis, who only owed nominal allegiance to their Gurus and their Mutts. Thus we find many Mutts claiming rights of superior Mutts over others, because the founders of the latter originally belonged to their establishments. In this state of things, on failure of Chelas, the Gurusthan or the original Mutt probably, has the right to nomi-

(1) 7 C. W. N. 147.

nate a Mohunt. Beyond this, it is difficult to conceive of any right in neighbouring Mohunts in Mutts of Sankara's orders, which have all histories of their own. To allow such a right is to make election impossible, as the electorate is indefinite and too numerous and scattered. But such a custom is allowable in Punchaiti, Nanakshahi and other Mutts founded in imitation of Sankara Mutts, which have got no regular body of celibate Sanyasis resident in the Mutts. It is in these Mutts that kings sometimes exercised the right of nomination. Nomination by the reigning king in Sankara Mutts is wholly inadmissible, for these Sanyasis claim to be above all kings. But in case of some temples established and maintained by kings, the right is sometimes allowed. But these are cases of temples and not Mutts properly so called. These temples are under Sanyasis, sometimes of the order of Sankara, and Chelas succeed to Gurus as in Mutts proper. But these Mohunts are after all Shebaits of temples over which their founders may have some right. The Mohunts of these temples are sometimes only pseudo-Sanyasis, as in Baidyanath. They marry and are succeeded by their sons and not by their Chelas and only lead an ascetic life when they are elected. Lawyers in India have not got the leisure to study the history of the laws and the institutions of the country and

thus place all Mutts within the same category, being ignorant of the differences between the several descriptions of Mutts and their history, and thus it has come to be considered that all the Mutts have no law, no uniform long established custom and that every institution is governed by its own peculiar custom.

In Madras, the rule of succession has thus been laid down by the Judges in a recent case : "succession to Mutts is regulated by the custom and usage of each particular Mutt, but in most cases, especially in Southern India, the successor is ordained and appointed by the head of the Mutt during his own lifetime and in default of such appointment, the nomination may rest with the head of some kindred institution or the successor may be appointed by the disciples and followers of the Mutt or in the last instance by the Court as representing the sovereign. (1)

In the Deccan, it has been held in Bombay that the Guru has the right to nominate his successor from among his Chelas by a written declaration (11 Bom. 514).

I proceed to give you some cases on the subject from the time of the Sudder Dewanny Adalut.

In 1806 in a case of the Giris (a Sankara sect) and also in the case of a Vaishnava sect, the

(1) Vidyapurna *v.* Vidyandhi, 27 Mad. 435.

claim of a Mohunt was recognized because he was installed as Mohunt at the celebration of the obsequies of the deceased Mohunt by the neighbouring Sanyasis (Dhunsing Gir *v.* Mya Gir, Macnaghten Rep. of Vol. I, p. 153. Ramrutten Das *v.* Bunmalee Das, Macn. Rep. Vol. I., p. 170).

In 1807, it was held in another case of the Giris, that a claimant, who was the principal pupil of the deceased and installed as his successor at his obsequies in an assembly of Mohunts, was entitled to succeed. It was further held that the successor must be a Chela or a pupil (Gonesh Gir *v.* Umrao Gir, 1 Macn. Re. p. 218).

In a case of Girs, it was held that "in some instance the Mohuntship descends to a personal heir and in others to a successor appointed by the existing Mohunt, but the ordinary rule is that Mutts of the same sect in a district or having a common right are associated together and on the occasion of the death of one Mohunt, the others assemble to elect a successor either out of the disciples of the deceased or from those of another Mohunt": Gossain Dowlut Gir *v.* Bissessur Gir (19 W. R. 215.) The principles of law down here are open to serious objection.

In a case of the Purbats, (another Sankara sect), the Sudder Dewany Adalat ordered a Panchayet or an assembly of Mohunts to be convened for the purpose of electing a Mohunt and such election, it was held, gave a good

title. (Surband Parbat *v.* Deosing Parbat, 1 Mac. 296).

In the N.-W. P. in the case of a Mutt of the Bharaties, (a Sankara sect), it was held that the right of succession depended upon his nomination by the Guru in his life-time of his successor, which nomination is generally confirmed by the Mohunts of the neighbourhood assembled together to perform his funeral obsequies. Where a Guru does not nominate his successor, then such successor is elected and installed by the Mohunts and principal persons of the sect in the neighbourhood, on the occasion of the funeral obsequies of the deceased (Neranjan Bhurtti *v.* Padorath Bhurtti, S. D. A., N.-W. P. 1864, p. 512). This decision was followed by the Allahabad High Court in the case of Madho Das *v.* Kanta Das, (1 All. 539).

In a later case of Puris, the Privy Council held that the particular custom of each establishment had to be proved and when a Chela appointed by the deceased Mohunt could not prove the custom that such appointment was sufficient when it was not confirmed by the Sanyasis of his sect, he must fail : Genda Puri *v.* Chhatar Puri (9 All. 1.)

In the case of a Vaishnava Mutt, the Calcutta High Court held that in case of a *maurosi* Mutt the investiture by the leading neighbouring

Mohunts at the Bhandra ceremony when the last Mohunt had nominated another did not give any title without proof that the plaintiff had a right to be so nominated by custom as senior Chela: Sita Prosad Dass *v.* Thakoor Dass, 5 C.L.R. 73.

The Privy Council in the matter of another Vaishnava Mutt, held that these Mutts were governed by custom and in that particular case before it, it was held that a Mohunt could appoint a spiritual brother as successor, in preference to a Chela but could not make two successive nominations: Greedharee Dass *v.* Nund Kishore, 11 Moore, 405.

In a later case, the Allahabad High Court held that it was necessary for a claimant to a Vaishnava Mutt to prove that he was a Nihung *i.e.*, an ascetic. Basdeo *v.* Ghareb Das, (13 All. 256.)

In a recent case of Ramanundi Vaishnava Mutt, the Calcutta High Court held that the Mohunt had the power of nominating his successor but could not delegate such power to another. (1)

Among Vaishnavite sects, the rules of Sankara Mutts are applicable when the establishments are those of celibates. (2) The Ramanuja Mutts are as a rule Mutts of celibates. But the Ballabhachrya Mutts are under Gurus, who are

(1) Ramji Das *v.* Lucchu Das, 7 C. W. N. 145.
(2) Mohunt Ramji Das *v.* Lacchu Das, 7 C. W. N. 145. Bhagban *v.* Ramanuj, 22 Cal. 843 P. C.

descendants of Ballabhacharya. These are all married men, sometimes too much married, men, with many human frailties, who nevertheless assume to themselves the position of being parts of Divinty—a position which they justify because they are descendants of Ballabhacharya who was supposed to be an incarnation and because a Guru according to some texts is higher than God himself. The ignorance and docility of Hindus of modern times have sometimes made them willing subjects of many acts of oppression and immorality at the hands of their spiritual guides whose claims on the bounty of their disciples know no bounds.

The male descendants of a Guru succeed to his right and failing them the females. Some of the wealthiest temples of Western India are under the management of these Gurus. They appropriate the profits to their own use and appoint other persons to worship, seldom worshipping the gods themselves being themselves objects of worship. One of them the Daoji of Nathdwara gave a portrait of himself to his Calcutta disciples for worship, for which a regular Brahmin Poojak was appointed and which was the subject matter of a heavy litigation. These offices are governed by the rule of primogeniture (1). But there is no reason why the rule of primogeniture should apply to them, as they are only participants in

(1) Goswami Sri Gridhari v. Romanlalji, 17 Cal. 3, 16 I. A. 137.

the profits of temples. But it has been held, with what reason it is difficult to see, that a claim to succeed under the Hindu Law of inheritance was not maintainable in such institutions, they being governed by special customs It was held that by custom a female may be excluded from the management : (Gopeelal *v.* Chundravolee Bahoojee, 19 W. R. 12, 11 B. L. R. 391).

In the case of these Ballabhacharya Mutts, it was held by the Privy Council that the ordinary Hindu law of inheritance was not maintainable but a male agnate suing the widow of the last holder could not succeed without proving that females could not succeed by custom : Gopee Lall *v.* Chandravolee Bahoojie, 11 B. L. R. 391.

In a later case, the Privy Council dismissed the suit of a widow on the ground that she could not prove a custom of female succession : Jankee Debi *v.* Gopal Acharya Goswami, 9 Cal. 766.

In both these cases the Courts omitted to consider that the rule of religious establishments should apply only to Mutts of ascetics.

The Maharana of Udaypore within whose territory the shrine of Nathdwara the richest of Ballabhacharya Mutts is situated once exercised the prerogative, supposed to exist in the State, of deposing a Mohunt for misconduct. But the deposed Mohunt succeeded in maintaining his possession of the Mutt properties outside the Udaypore dominions, the Bombay High Court

holding that the act of the Mahrana was not binding on it (Goswami Sri Govardhanlalji *v.* Goswami Sri Girdharlalji, 17 Bom. 620).

Among Bengal Vaishnavas also, the descendants of the original teachers Adwaita and Nityanunda claim rights similar to those of the descendants of Ballabhacharya. But they have no such rich temples as those of Nathdwara or of Gokula. Among them there is no rule of primogeniture.

The Byragees of Bengal, who generally keep women with themselves, sometimes claim to be governed by the rule of Yagnavalkya about Sanyasis and they had their claims allowed by the Calcutta High Court, which held in a recent case, that according to custom proved in that case, the preceptor of a preceptor of a Byragee was entitled to succeed to the property of a deceased Byragee. Now if a person becomes a Sanyasi and then falls from the path of ascetism, he becomes according to the Smritis, a slave of the King and his property belongs to the State. But if he was from the beginning that strange individual, a married asectic or an ascetic living with a woman, he could be no Sanyasi and his natural heirs should take his property.

In Madras, it has been held that a Sudra cannot be a Sanyasi according to the Smritis and consequently the ordinary rule of inheritance applied to the property left by him. But by the custom of

Vaishnavas it is now well established that a Sudra can be an ascetic. In Southern India and in Assam, there are several Mutts under Sudras. According to the Tantras, a Sudra can be a Sanyasi. It being remembered that according to certain Puranas and Tantras, a person, even if he be a Brahmin, cannot be a Brahmachari or a Banaprastha in this the Kaliyuga and that the rule of the Asramas has been abrogated by custom, there is not much reason to object to the custom of allowing a Sudra to become an ascetic. But he can have no place in a Sankara Mutt.

We next go to the question of succession of Mohunts of temples. In the famous temple of Vaidyanath a curious custom was upheld by the High Court. The custom that is supposed to prevail there is that the office of Mohunt is hereditary in a certain family, in the eldest male line. But the Mohunt who is called Sardar Panda must be of 45 years of age and become an ascetic when he ascends the Gadi. He may be dismissed for misconduct. In case of disqualification or misconduct of a Mohunt, the Pandas attached to the Mutt have the right to elect a Mohunt qualified according to the rules of the Mutt from among the descendants of the original Mohunt (Shailagananda Dutt Ojha *v.* Umeshnanda Dutt Ojha, 2 Cal. L. J. 460.)

In the case of a temple at Rameswaram in Madras, it was held that the Dharmakarta had

the right of nominating a Pandarun whom he had initiated during his tenure of office but could not do so, when he was dismissed (1).

In another temple founded by the Shivagunga Zemindars, it was held that the head of a Mutt called Paradesi could be a married man, having the right to appoint his successor, provided he was initiated. In the particular case, there was no qualified disciple and the Court held that the Zemindar could appoint a Dharmakarta with the concurrence of the members of the family of the last holder (2).

In the Akharas of Assam founded by another Sankara, who was a Sudra, in the case of the Burpita Shaster which was founded by Sankardeb himself, the original Mohunts or Shastriahs were Sudras but afterwards, Brahmins only have come to be entitled to the office, the last Sudra Guru Bora Atee having bequeathed the Mutt to his Brahmin Guru Ram Ram Guru. The investiture is supposed to be made in these Mutts by placing the sacred *Mala* with *Tulsi* on the neck of the Mohunt. It was held by the Sudder Dewany Adalut in the case of Bikram Deb *v.* Bhoobun Mohun Deb (S. D. of 1848, p. 177, S. D. of 1850, p. 390), that the Mohunt or Boora Shastera was elected either by the Soomohoobhokut or worshipping resident disciples

(1) Ramalinga Pellai *v.* Vythelingam Pellai, 16 Mad. 490 P. C.
(2) Sattiapayar *v.* Pereasami, 14. Mad. I.

attached to the temple or the Sobhokut together with them. In the case of the Mohunts of the subordinate Shasters, which were four in number, there were officers called Deka or Naib Shusteera. Their claim to succeed was disallowed. It was in evidence that the original grant or Pholee by the King of Assam, Seebsing Ray, was in the name of the Bhokuts and the custom of the Shaster was embodied in the Revenue Comissioner's letter of 1842, which makes the following direction in a similar case : "in furtherance of the orders of Government you will be pleased to inform the communities of the temples of Hazoo and the Oomanund that if the majority of the people of each temple choose to displace the suspended Sewachuchivas and Jogeswar Gossain, they are at liberty to do so and proceed to a new election."

In the case of the Kamalabari Shuster in Upper Assam, it was held that the Bhukuts were originally slaves and now had rights to their offices and could not be turned out at the pleasure of the Adhikary, as they had changed their status by taking the vow of celibacy when entering the Shuster; but they had no right to the management and the Shoomotoo or Samuha Bhukuts or the general body of Bhukuts had no control over the Adhicary. (1)

In the Aunati Chatra, which is supposed to

(1) Dooteeram Shurma *v.* Luckheekant Gossamee, 12 W. R. 425.

be one of the four principal Mutts of Assam, the custom alleged is that the Adhikari is succeeded by the Deka Adhicary, who is made Deka by the Adhicary during his life time. The Bookuts claim the right of dismissing the Adhicary for misconduct and the Adhicary claims the right of turning out the Bhookuts for neglect or refusal of duty. The matter is now before the Courts.

In Madras, there are some rich temples founded by and under the superintendence of local Rajas and Zamindars. In some of these, it has been held, that the head of the Mutt has the right to nominate his successor, subject to confirmation by the Zamindar. (Suttappayer *v.* Pereasami) (1). In some Mutts, the Dharmakarta or the Superior has the right to nominate his successor (Ramalingam Pilla *v.* Vythilingam) (2).

Let us now examine one or two cases concerning the rule of succession among Nanakshahi and Kabirshahi Mutts.

Among the Kabirshahi Mutts, as early as 1851, in a case of Kubeer Choura in Puri, the Sudder Dewany Adalut held that the Mohunt must be a Nyhamgi or Beyogee *i. e.*, ascetic and not a Grihasta or Sanjogi (Mohunt Gopal Das *v.* Mohunt Virupa Ram, S. D. 1851, p. 162.).

The orthodox Sikh temples are institutions

(1) 14 Mad. 1.
(2) 16 Mad. 490, 20 I. A. 150.

where a copy of the Granth or religious book is kept and worshipped and where Sikh sojourners are given food. The most famous of these institutions is that of Harmandil at Patna, where Guru Gobind Sing, the tenth Guru, was born in 1660 and where his cradle or 'Pangura' and a copy of the Granth sent by him, which is said to contain a gold leaf on which the said Guru had inscribed some words, are kept. The question arose early whether Act XX of 1863 applied to this institution. The High Court in 1881 held that the Board of Revenue had before that time exercised superintendence over it and the Act applied. It was held in that case that the removal of the Granth, even temporarily, was a breach of trust. (1) Since that time, the affairs of the temple have several times come before the Courts.

The temple of Harmandil has all along been under the charge of a Mohunt. The custom which was alleged to govern succession was that the Mohunt must be an Akali Pardesi *i.e.* a Panjabee and a Khalsa Sikh and a man of pure moral character and not convicted of any crime and further he must be a chela of any one of the preceding Mohunts and nominated by the last Mohunt. After the death of Genda Sing, who was Mohunt, one Dhurrum Sing succeeded him. But he was dismissed by the

(1) Dhurrum Sing *v.* Kissen Sing, 7 Cal. 767.

District Judge and certain persons were appointed receivers. A person named Tega Sing claiming as chela of Genda Sing, brought suits for being appointed Mohunt which twice came before the High Court but were dismissed on the ground that he had failed to establish his claim. This temple has a brotherhood of officiating priests, who claim to outcaste any Sikhs they like and to be one of the controlling bodies of the Sikh religion. They have no connection with other sects such as, Nirmalis, Dhirmalis and Ramrais. The Court in several instances appointed receivers after consulting the ruling Sikh Chiefs of the Punjab. Thus in case of no nomination, the District Judge, after consulting the resident priests and the Sikh chiefs, has appointed managers. The Mohunt also may probably be elected in that manner. But the orthodox custom seems to be one of nomination by a Mohunt of his successor from among his Chelas, who must be an Akali Purdashi of good character.

It was held by the High Court, that the custom proved was that the Mohunt nominated by Ekerarnama his successor and failing such nomination, the Court appointed a manager, who might be Mohunt (1). It has also been held, that a Mohunt cannot nominate after his

(1) Tega Sing *v.* Sumer Sing decided by the High Court in July 1891.

dismissal by the Court (1). It also appeared in these cases, that the Mohunts described themselves in the Ekrarnamas of nomination as Poojaries and Moktars of Gaddi Harmandilji. As these Mohunts are very often married men, the rules of succession of these Mutts are rather of an anomalous character.*

In some of the principal Sikh temples, the right to offices is hereditary.

We next come to the rule of succession in subordinate Mutts. We have already seen how difficult it is to ascertain whether a Mutt is really a subordinate one. But when the subordinate position of a Mutt is admitted the right of the head of the superior Mutt to nominate, to revoke the nomination of or dismiss the Mohunt follows as a matter of course (Gnana Sambanda *v.* Viswalinga, 13 Mad. 338). But in subordinate Mutts of long standing, the custom prevails of the Mohunt nominating his successor from among his *chelas* subject to the approval of the superior Mohunt. The superior Mohunt has only the power to choose one of the *chelas* of the deceased subordinate Mohunt. If it were otherwise, the *chelas* of a subordinate Mohunt would have no rights and there would be no

(1) Dhurrum Sing *v.* Didar Sing, 7 Cal. 767. Tega Sing *v.* Bichitra Sing (A. O D. no 546 of 1905) decided 20th Dec. 1905.

* For the customs of Sikh temples, see Guru Gobind Sing Sakhi translated by Sirdar Attar Sing (1873); Adi Granth translated by Dr. E. Temp ; The Law of Inheritance of Sikh Chiefs by Sir L. Griffin.

chelas and it would be difficult to carry on these establishments. But in some Mutts in Madras, the Superior exercises his strict rights of appointment and dismissal of subordinate Mohunts.

In the case of subordinate Mutts, it has been held that the Mohunt of the superior Mutt may sometimes nominate a person to be the head of a subordinate Mutt and that his successor can revoke the nomination for good cause, before it has been given effect to (1).

A question has sometimes arisen, whether a Mohunt insane or incurably deceased can nominate his successor. The first question that ought to have been asked is whether such a person can continue as a Mohunt. Such a person could not be admitted into the Sangha under Buddha's rules. But there is nothing to prevent him under the Smritis from becoming what is called an *Atoor* Sanyasi. But I doubt very much whether he can be a Guru. The Mohunt of a Sankara Mutt is there in his capacity as Guru or teacher. The Mohunts of the Sringeri and Dwarka Mutts are called the Jagatgurus or teachers of the world. It would follow therefore, that a person labouring under the above-mentioned disqualifications would cease to be a Mohunt. The question arose whether a leper Mohunt could nominate his successor. It was held that he could not, when he had

(1) Gnanasambanda *v.* Viswainga, 13 Mad. 338.

leprosy of a virulent character and not otherwise. (1) The ceremony of taking a *chêla* was considered in that case to be like taking in adoption; a misconception which has been dealt with before.

We have seen that as a rule a Mohunt has the right to nominate his successor. There can therefore, be no doubt that if he renounces his office he can nominate his successor. When there is a well-established custom regulating the succession, the Mohunt can only make over his office to the person who would be his successor according to such custom. (2)

A Mohunt or a Shebait cannot change the rule of succession at his pleasure. (3) An assignment also by the Mohunt or Shebait or manager of a Pagoda "of the right of management is beyond his legal competence according to the common law of India." (4)

A Mohunt has no power to nominate nor the Sanyasis to elect as Mohunt, one, who is not a Sanyasi, in a Sunkar Mutt. But in Mutts, where there are two classes of Sanyasis, the married and the celibate, it is sometimes a

(1) Bhagaban Ramany v. Ramprassanna, 22 Cal. 858 P. C.

(2) Mancharam *v.* Pransankar, 6 Bom. 298. Sitaramchat *v.* Sitaram, 6 Bom. H. C. 250.

(3) Mohunt Rumini *v.* Mohunt Ashbul, 1 W. R. 160. Rupnarayn *v.* Junkee Bye, 3 C. L. R. 112.

(4) Raja Vurma *v.* Rabi Vurma, 4 I.A. 76. Sarkam Abu *v.* Rahamun, 24 Cal. 83. Gnana Sambanda *v.* Velu, 27 I. A. 69. Durga *v.* Chunchal. 4 All. 81. Rajarafa *v.* Gonesh, 23 Bom. 131. Parayan *v.* Ranga, 15 Mad. 183.

question of difficulty whether a so called Grihast Sanyasi can be a Mohunt. In the N.-W. P. in most Mutts, the Superior must be a Nihang and not a Grihast. (Basdev *v.* Gharib, 13 All. 256).

A curious case arose in Madras, on the question whether a Mohunt should be an ascetic. The Jheer or the Mohunt of a Mutt nominated a person to be his successor and directed him to become a Sanyasi in a day or two. His nomination was not confirmed by the other disciples and he wanted four months' time to become a Sanyasi. The Court held that his nomination was imperfect and he should have become a Sanyasi as soon as he was initiated. (1)

The next question is who is to take the property of a Sanyasi, who is not a Mohunt and has not set up an independent establishment. In such a case, the rule of Yajnavalkya, II. 167, is supposed to apply, and the disciple is the heir of a Yati, the spiritual brother of a Vanaprastha and the preceptor is the heir of a perpetual student. There is a case in which a certificate to collect debts was granted to a disciple, in preference to a spiritual brother, it being assumed that a disciple takes in all cases (2). The Allahabad High Court however, have laid down the rule that "a right of inheritance strictly speaking to the property

(1) Rangacharior *v.* Yegna Dikshatur, 13 Mad. 524.
(2) Dukharam *v.* Luchman, 3 Cal. 954.

of a Guru does not exist" among Sanyasis (1). This rule is certainly correct according to the Smritis. A Sanyasi can hold no property. The property, mentioned in the Yajnavalkya, as interpreted by the Mitakshara and the Apararka, is the wealth of a hermit invaluable to his disciples *i.e.*, his stick, his begging bowl and the like.(2) Lands and money, the Sanayasi

(1) Niranjun Barthee *v.* Padaruth Barthee, S. D. A., N. W.-P. 1864, Vol. I., p. 512. Madho Dass *v.* Kanta Das, 1 All. 539. In Re. Bhyrub Bhurtee Mohunt, 21 W. R. 340. See Vyavastha Darpana, 312, 4 Cal. 543, 10 Mad. 384.

(2) वानप्रस्थ सति ब्रह्मचारिणां रिक्थभागिन ।
क्रमेणाचार्य सच्छिष्य धर्म्मभ्रातैकतीर्थिन: ।

"The heirs of a hermit of an ascetic and of a professed student are in the order, the preceptor, the virtuous pupil, and the spiritual brother and the associate in holiness.

Upon this the Mitakshara says as follows: "The heirs to the property of a hermit, of an ascetic, and of a student in theology are, in order (that is, in the inverse order) the preceptor, a virtuous pupil, and a spiritual brother belonging to the same hermitage. The student (Brâhmachari) must be a professed or perpetual one; for the mother and the rest of the natural heirs take the property of a temporary student; and the preceptor is declared to be heir to a professed student as an exception. A virtuous pupils take the property of a Yati or ascetic. The virtuous pupil, again, is one who is assiduous in the study of theology, in retaining the holy science, and in practising its ordinances. For even the preceptor and the like cannot inherit when their conduct is bad. A spiritual brother who belongs to the same order (एकतीर्थी एकाश्रमी धर्म्मभ्राता चासावेकतीर्थी च धर्म्मभ्रातैकतीर्थी) takes the goods of a hermit (Vanaprastha). But, on failure of these (namely the preceptor and the rest), the spiritual brother belonging to the same order takes, even when there are sons and the like. Are not those who have entered into a religious profession unconcerned with heritable property? Since Vasista declares: "They who have entered another order, are debarred from shares." How then can there be a partition of their property? Nor has a professed student a right to his own acquired wealth; for the acceptance of presents, and other means of acquisition are forbidden to him. And since Gautama has ordained: An ascetic shall have no hoard" (अनिचयो भिक्षुरिति). The ascetic also can have no effects by himself acquired. The answer is, a hermit may have property; for the text of Yajnavalkya declares: "The hermit may make a hoard of things sufficient for a day, a month, six months, or a year; and in the month of Aswina he should abandon what he has collected. The ascetic too has cloth, books and other requisite articles; for a passage of the Veda

cannot hold in his own right. But pseudo-Sanyásis, who are considered as true Sanyasis, do now-a-days hold property in the same way as secular persons and in such cases, his secular heirs ought to take his property. (1)

When a Sanyasi, as it very often happens, dies without having a *chela*, while living as a member of a Mutt, his property according to the Smriti Chandrika Ch. XI. Sec. 7, is taken by the Mutt.

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directs, that he should wear cloths to cover his privy parts, and a text of law prescribes, that "he should take the requisites for his austerities and his sandals." The professed student likewise has clothes to cover his body. It is therefore proper to explain the partition of such property."

The above translation is by Colebrooke. I have however, taken the liberty of correcting some obvious errors. It will appear from the above that an ascetic can have no money or lands and the law of inheritance mentioned above, cannot apply to such property. Apararka also is of the same opinion. It says that Yatis and Brahmacharis have some rags and the like as property to which the above rule of Yajnavalkaya applies; otherwise, it is infructuous.

यतिब्रह्मचारिणोरपि कन्थादि किञ्चिदस्त्येव । अपरार्कः ।

(1) See 10 W. R. 172, 4 Cal. 954, 22 Mad. 302.

LECTURE XIII.

Judicial Proceedings relating to Trusts and Trustees.

We have nothing in the Smritis to show that the State exercised any control over endowments and trustees created by private individuals. Indeed these are all of comparatively modern origin. The great temples were mostly built by kings and were under the supervision of the State. There were also numberless temples built by private individuals for religious merit, many of which were in celebrated shrines and places of pilgrimage. There is no evidence that the State exercised any control over private Debutter. Under the Muhammadan Law however, the law of trusts was more developed and the Muhammadan Courts exercised some control over Wakfs or religious and charitable trusts and Wakifs *i. e.* trustees. It was probably, the influence of Muhammadan lawyers that developed the law of trusts among Hindus to a greater degree than in ancient times. The Hindu Kings also, in imitation of the Muhammadan rulers, began to exercise some degree of control over endowments and trusts other than those created by themselves. West and

Buhler, as well as Steel, were of opinion that under the Hindu and Muhammadan governments, the Courts of the country had jurisdiction over endowments and trusts. It has been laid down by the Privy Council that the British Government by virtue of its sovereign power possesses, as the former rulers of the country did, the right to control all public religious endowments and to redress abuses in the management of such endowments and of all charities (1). The King is to be considered *parens patria*, protector of every part of his subject. It was sometime doubted whether the Civil Courts established by the British government had any jurisdiction over Hindu endowments. It was however, very early decided that they had jurisdiction to prevent breaches of trusts and could exercise some degree of control over trustees. (Maharanee Shibeswaree *v.* Mathooranath, 13 Moore 274).

Before 1810, the Civil Courts exercised a sort of a general power of supervision over trusts. In 1810, on account of the scandalous mismanagement of certain temples, a regulation, Reg. 19 of 1810, was passed in Bengal, placing these endowments under the direct supervision of the Board of Revenue.

Similar Regulations, Reg. 7 of 1817 (Madras)

(1) Attorney General *v.* Brodie, 4 Moore 190 Mayor of Lyons *v.* The East India Company, 1 Moore 175.

and Regulation 17 of 1827 (Bombay) were passed for Madras and Bombay. These regulations related generally to public temples and endowments created by preceding governments or by individuals and had nothing to do with the Mutts of Sanyasis. The control of the management of these temples which was vested in the Board of Revenue was however, found objectionable by many. The objection to the control of the Board of Revenue came not from Hindus but from Christian missionaries, who protested against a Christian government exercising control over pagan temples. So loud was the outcry that the Government was obliged to yield and to give up its control of these endowments. The Regulations about them were all repealed, and by Act XX of 1863, the Board was relieved of the burden of looking after the temples and other endowments and provision was made for making over the properties to trustees or committees of management. Committees were appointed under the Act for many temples but many were made over to the management of Mohunts and other Shebaits, as it was, before the Regulations were passed.

Act XX of 1863 however, does not apply to all endowments. It has been held to be applicable to all endowments created before 1810(1), whether

(1) Protap Chunder v. Brojo Nath, 19 Cal. 285; 8 Cal. 32. See however 9 C. L. R. 433.

the trusteeship is hereditary or not (1); but not to private endowments for household deities (2), or where there is a Mutt, but the endowment is private (3).

By Sec. 14 of Act XX, any person interested in a trust coming under it, may, with the leave of the District Judge, sue before the Civil Court, the trustee or manager for any misfeasance or breach of trust and the Civil Court is authorized to order the trustee or manager to perform a particular act and to dismiss him, if necessary. It has been held that the act does not prevent, the Committee appointed under it from suing their manager or removing him without leave of the Judge (4), nor a trustee from suing his predecessor (5). But such suits are limited in their scope to cases of malfeasance, malversion or neglect of duty (6).

Though a trustee may be removed under Section 14 of Act XX of 1863 it is doubtful whether a new trustee may be appointed under the section (7). A similar question rose under Sec. 539. P. C. which is considered elsewhere.

In Madras, it has been held the management

(1) Natisa *v.* Ganapati, 14 Mad. 102.
(2) Protap *v.* Brojo, 12 Cal. 275.
(3) Sathappayer *v.* Periasami, 14 Mad. 1.
(4) Paddalabh *v.* Ramgopal, 9 Cal. 133. Sheshadri *v.* Ayyangar, 21 Mad. 179. See 17 Mad. 212.
(5) Virasami *v.* Subha, 6 Mad. 54.
(6) Natisa *v.* Ganapati, 14 Mad. 103,
(7) Jan Ali *v.* Jan Ali, 8 Cal. 32. Sivayya *v.* Ranu Reddi, 22 Mad, 223. See 2 Mad. 197, 3 Mad. 401.

of Devasthans or Devasams of Malabar, the heads of which are called Urulans, had been made over to the Zamorin Raja and the Palghat Raja and cannot be interefered with under Act 20 of 1863 (1).

A suit for the removal of a Mohunt and the appointment of the plaintiff in his place, as having the better right, is not within the scope of Act 20 of 1863 but should be brought as a title suit under the ordinary provisions of the Civil Procedure Code (2).

It was for sometime thought that Act XX of 1863 covered all cases of religious trusts and no provision was made in the Civil Procedure Code for suits concerning religious trusts. But the mistake was soon found out and Sec. 539 of the Civil Procedure Code was amended so that suits might be instituted under it, not only for public charitable but also for public religious trusts. Under it, any two persons interested in a trust, with the consent of the Advocate-General (3) may bring a suit in the High Court or in the Court of the District Judge, for the proper administration of the trust, for the removal and appointment of trus-

(1) Jituni Rannikkar *v.* Irani Nambadripad, 3 Mad. 407.

(2) Keshore Bon Mohunt *v.* Kalee Churan Gir, 22 W. R. 364 (Sitakund case.)

(3) It has been held that in Allahabad, the Legal Remembrancer there holds the same position as the Advocate-General elsewhere, 25 All. 631.

tees, for settling a scheme of management and the like purposes. (1)

The next question is who can maintain an action under Sec. 539 C. P. C. Originally under that Section persons having a direct interest could do so and it was held in Calcutta and Madras, that mere worshippers at a temple (2) or even the general manager of a temple, had no such interest (3). The Bombay and Allahabad Courts however, took a different view (4). The Section, was in consequence amended in 1888 and the word 'direct' omitted. Since then it has been held that mere worshippers and Poojaries or officiating priests, Pandas, Paricharaks and Musriffs and the like can maintain an action under Section 539 (5). The word interest is now understood in a very wide sense.

A suit under Sec. 539 will lie against persons, who, though they are not trustees regularly appointed, take charge of endowed property, and though they may not have consciously accepted a trust, a remedy may be sought

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(1) Syed Husein Khan *v.* the Collector of Kavia, 21 Bom. 48. Girddhary *v.* Ramlal, 21 All. 200. See 20 Cal 810, 397. 6 Cal. 11, 24 Cal. 418, 21 All. 200, 15 Bom. 612. Contra Srimvasa *v.* Srimvasa, 16 Mad. 31 Rangasami *v.* Varadapa, 17 Mad. 462. F. B.

(2) Jan Ali *v.* Ramnath, 8 Cal. 32. Lutfunnissa *v.* Nazirun, 11 Cal. 33.

(3) Narasinha *v.* Ayyan Chetti, 12 Mad. 157.

(4) Zafar Yab *v.* Bakhtwar, 5 All. 497. Jawahra *v.* Akbar, 7 All. 178. Raghubar *v.* Kesho Ramaney, 11 All. 18. Manohur Ganesh *v.* Lakshmiram, 12 Bom. 247. Manohar *v.* Keshevram, 12 Bom. 267.

(5) Sajedur Raja *v.* Gour Mohun, 24 Cal. 418. Jugulkeshore *v.* Lakshmadi Das, 23 Bom. 659. Shailagananda *v.* Umeshananda, 2 Cal. L. J. 460.

against them for maladministration by a suit by persons interested, as under the Roman system, in a like case, by means of a *papularis actio* (1).

There is a difference of opinion about the question whether a suit for the removal of a trustee falls within the scope of Sec. 539. The weight of authority seems to be in favour of the proposition that it does.(2) It has been rightly pointed out that Sec. 539 is very different in its terms and in its scope from Samuel Romilly's Act 32, George III. Cap. 10, upon which the judgments holding a different view were based. Indeed, if a trustee could not be removed and a new one appointed in his stead, the provisions of Sec. 539 would become infructuous. What is the good of settling a scheme of management or a decree for proper administration, if there is no power over a trustee except that of sending him to jail for contempt for disobeying Court's orders? When a trustee is sent to jail for contempt somebody must take his place. Who is to appoint his successor even for the time being, if it is not the Court? Dismissal and appointment of trustees would therefore seem to come within the purview of the section.

But a Mohunt of a temple or a trustee should

(1) Jugal Kishore *v.* Lakshman, 23 Bom. 659. Manohar Ganesh *v* Lukshiram, 12 Bom. 365. Aberdeen Town Council *v.* Aberdeen University, 2 App. Cas. 514.

(2) Shailajanund *v.* Umeshanund, 2 Cal. L. J. 460, 21 Bom. 48, 21 All. 200. See Lewin on Trusts, 9th Ed., p. 1062.

not be lightly dismissed. It has been held that he should not be dismissed for neglect of duties or for misconduct not of a gross character unaccompanied with deliberate dishonesty. An occasional failure of duty, which is not fraudulent, is not sufficient (1). When the trustee has dealt with the trust property for his own personal benefit, he is liable to dismissal (2), but not, when there has been no wilful default but merely a misunderstanding (3). A mistake by a hereditary trustee of a Devasthan as to his true legal position does not of itself afford a ground for removal (4). But it is difficult to conceive that any body in charge of a Hindu endowment can seriously make a mistake as to his position. The Bombay High Court have, therefore, it seems to me rightly, held that mere assertion of a right to treat endowed property as private property is sufficient for the removal of a trustee (5). The Calcutta High Court have also held, that when part of the income is deliberately spent for private purposes, the trustee or Mohunt is liable to dismissal (6). But in any proper case, the Court, without dismissing a trustee may impose conditions on him for the proper discharge of duties(7).

(1) 2 Cab L. J. 476.
(2) Mayor Coventry *v.* Attorney General, 7 Br. B.C. 235. Bukeridge *v.* Glasse Cr. & Ph. 131.
(3) Attorney General *v.* Cooper's Company,' 19 Vis. 192. Attorney General *v.* Cains College, 2 Keen 150. Annanji *v.* Narayun, 21 Bom. 556.
(4) Damodar Batji *v.* Bhat Bhogilal, 22 Bom. 493.
(5) Chintamoni *v.* Dhando, 15 Bom. 612.
(6) Shailjananda *v.* Umeshanada, 2 Cal. L. J. 460.
(7) Sivasankar *v.* Vadgeri, 13Mad. 6. Annaji *v.* Narayan, 21 Bom. 556.

A suit for the removal of a trustee and for the recovery of trust property, improperly alienated to a third party, can also be maintained against the trustee and the alienee (1) jointly but not against the alienee alone (2).

Under Sec. 539, it has been held that the Court can direct an account to be taken from Shebaits of a trust property or Mohunts on the ground that such an account was necessary before a scheme could be framed (3).

It is a question of some difficulty whether in the case of public trusts a suit under Sec. 30 of the Civil Procedure Code may be brought. In two cases in Calcutta, it has been held that a suit to remove a trustee by two worshippers in a temple was not maintainable, though the plaintiffs had obtained leave under Sec. 30 C.P.C. as the provisions of that section applied to an ascertainable class and not to communities like the entire public (4).

Suits regarding ascetic Sanyasi Mutts do not come within the provisions of Act XX of 1863. Do they come under Sec. 539 C.P.C. It is supposed by some that they do not. Are the Mohunts therefore wholly irresponsible? Supposing a Mohunt becomes a Muhammadan, is there no power

(1) Sayadur Raja *v.* Gour Mohun, 24 Cal. 418.
(2) Lakshmandas *v.* Ganpatro, 8 Bom. 365.
(3) Monohar Ganesh Tambekar *v.* Lakhmiram Gobindram, 12 Bom. 247, confirmed in Chotalal *v.* Monohar, 26 I. A. 199, 24 Bom. 50.
(4) Sajedur Raja *v.* Baidyanath, 20 Cal. 397. See 20 Cal. 810, 9 Mad. 463.

in the Sanyasis of a Mutt to turn him out? The property belongs to the community of Sanyasis and not to the Mohunt in his personal capacity. Being a Sanyasi he can hold no property under the law. Even if he be considered as a Guru, unlike householder Gurus, he can hold no property in his own right. He is only a trustee holding the property in trust, (1) for the maintenancee of the Sanyasis of the institution (2), for the propagation of the doctrines of the sect to which he belongs and for education and (3) for charities to the poor. According to ancient custom, these are objects for which moneys of a religious institution can be spent and have always been spent. If the Sanyasis of an institution join in bringing a suit for the removal of a Mohunt, for conduct which would exclude him from the ranks of Sanyasis or for deliberate and gross dishonesty, or for an injunction to restrain him from improper appropriation of the funds of the Mutt, I can see no reason why such a suit will not lie. The other alternative is to allow the Sanyasis to take the law into their own hands and turn the Mohunt out. If the Sanyasis have got any right, the Civil Courts can certainly enforce them. Indeed, it is difficult to see why any one of the Sanyasis of an institution cannot bring such a suit, if the others refuse to join him as plaintiffs by making them defendants. Indeed all the Puri Sanyasis

of India have some sort of a right of reversion to the properties of any of the Puri Mutts and in case of a combination by the Sanyasis of an institution to misappropriate the funds of the Mutt or to divert them to purposes other than the customary ones—say if all the Sanyasis turn Christians and desire to make over the finds to the Society for the propagation of Christian literature, or say, if they all marry and divide the funds among themselves,—there is no reason why the heads of the other institutions of Puri's will not be able to bring a suit for the recovery of the property from the hands of these fallen and outcast Sanyasis. The proper person to bring such a suit would be the Mohunt of the Gurusthan or the Mutt of the Guru of the original founder of the Mutt, and failing him, any Sanyasis of the Puri order. Similar observations would apply to the Giris and the Bharatis and the other orders of Sanyasis. Indeed, all the Sankar Mutts of the ten orders and in particular, the four Mutts founded by Sankara, have the right of reversion to one another. We find that the Saroda Mutt of the Saraswatis of Dwarka sometimes, exercises control over the Goberdhan Mutt of the Tirthas of Puri. All these Mutts still consider themselves parts of one system.

The Hindu public were for sometime greatly agitated by the proposal of a legislation for regulating public endowments including the

Mutts. A bill was actually framed and brought before the Supreme Legislative Council. But it was at last dropped. There is nothing on principle to prevent the government by legislation from suppressing all these institutions and confiscating their property as was done in England in the case of the Priories and of the Knights Templars. But the British Government always bears in mind the fact that it is a foreign government and true to its high imperial policy refuses to interfere with the religious institutions of its subjects. It would certainly be good for the country, if the management of the vast wealth in the hands of Sanyasis could be so regulated as to conduce to the public welfare. But having regard to the character of these institutions, it must be admitted, that it is difficult, for any Court to interfere in their management without destroying their constitution altogether. According to the Smritis, kings should never themselves decide questions regarding ascetics. Vrihaspati lays down that persons wearing the token of a religious order should adjust their disputes according to their own rules. Indeed, it seems to me that according to Hindu law, the Courts can only interfere when the Mohunt ceases to be a Sanyasi or when the property of a Mutt is wholly diverted from its original objects by a combination of the Sanyasis of the institution. The property belongs to the Sanyasis, and they

have the right to object to an outsider, even though he be the King, laying down rules for them, so long as they continue to be Sanyasis.

The above observations only apply to Sankara Mutts and to some of the Vaishnava Mutts of celibates. As regards the Mutts and establishments of other orders, it is difficult to lay down any rules for them. They are not true Sanyasis and are not governed by the rules of Hindu Law but are only governed by their own peculiar customs all of modern origin, which are supposed to be based on Sankara's system but which are after all wholly different from them. As regards married hereditary Mohunts, it must be said that they have a personal pecuniary interest in the profits of the temple or the institution. But whenever there is a congregration of Sanyasis, they must be considered to have a right to enforce the performance of the customary duties by the Mohunt.

The Sanyasis of a reilgious institution are at least entitled to be maintained by it. Indeed their rights are of so personal and direct a character that they cannot be deprived of the ordinary remedies of individuals in Civil Courts. These Sanyasis, are the ascetic disciples of the original Guru and their *chelas* living in the Mutt. Those that live separately can have no rights, except when there is a failure of the Sanyasis in an institution.

In cases of certain temples founded and maintained by Zemindars in Madras, it has been held that the head of a Mutt may be dismissed by them for malfeasance or misfeasance. These temples, it should be observed, are not religions institutions properly so called.

In Assam, in certain institutions, there are no Sanyasis but a class of worshippers called Bhagats. In the Kamalabari Akhara, the Bhagats claimed the right to dismiss the superior, but it was held that they could not do so, nor could the superior turn out the Bhagats.

We have already seen that there has been much discussion about the capacity in which Shebaits and other trustees of religious endowments sue and are sued. In a recent case, the Privy Council have considered the matter and laid down that in dedications of the completest kind an idol is rightly regarded as a juridical person capable as such of holding property but there may be dedications of a less complete character as in the cases of Sonatun Bysack *v.* Juggut Sundree and Ashutosh Dutt *v.* Durga Charun, in which notwithstanding a religious dedication, property descends (and descends beneficially) to heirs, subject to a trust or charge for the purpose of religion; "but assuming the religious dedication to have been of the strictest character, it still remains that the possession and management of the dedicated property belongs to the Shebait,

And this carries with it the right to bring whatever suits are necessary for the protection of the property. "Every such right of suit is vested in the Shebait and not in the idol" (1). Their Lordships as a consequence of the above position held that a minor Shebait is not deprived of the benefit of Sec. 7 of the Limitation Act on the ground that the title is not in him. In the case of Mutts, it has been held in Bombay, litigation in respect of it has ordinarily to be conducted by and in the name of, the Mohunt or manager, not because the legal property is in the manager but because it is the established practice that the suit could be brought in that form" (2). The position has been discussed by me before Ch. IX. It would be simpler to consider both Shebaits and Mohunts as trustees and not to give them positions unknown to Hindu or English Law.

Suits affecting Debutter property can be brought by and against the Shebaits only, except in cases under Act XX of 1863 and under Sec. 539. C. P. C. in respect of public charitable or religious trusts (3), and in such suits all the Shebaits should be made parties to the suit, either as plaintiffs or as defendants. One of several Shebaits cannot bring a suit, when the others do not join him,

(1) Jogadindra Nath Roy *v.* Hemunta Kumari Debi, 32 Cal. 129 P.C.
(2) Babaji Rao *v.* Lukman Dass, 5 Bom. L. R. 932.
(3) Raghubardyal *v.* Kishormony, 11 All. 18. Jagadindra Nath *v.* Hemanta Kumary, 32 Cal. 129. Raja Peary Mohun *v.* Narendra Krishna, 5 C. W. N. 279

except when he proves that the others refused to join him or are minors and have all been made parties defendants, as in the case of co-owners of property, the office of the trustee being a joint one.

In an early case, certain properties had been dedicated to the family idols by five brothers, who at the time constituted a joint Hindu family and who afterwards separated. The heirs of some of the brothers had alienated parts of the dedicated property. The widow of one of them had the properties settled in her name after resumption and claimed paramount title and further claimed that no dedication was valid without the assent of the Government. The suit was brought by the son of one of the brothers against the heirs of the other four brothers and alienees of some of them for a declaration that the Debutter was valid, for setting aside the alienations and for the appointment of a Shebait. The Privy Council decreed the suit in the main, without appointing Shebait, but added that there might be another action for the enforcement of the religious trusts being declared on the appointment of a proper Shebait (1). But since that time, in no case, has the Court appointed a Shebait for a private Debutter. The practice now recognized is for the heirs of the founder, male and female, to be regarded as the joint Shebaits, the

(1) Juggut Mohinee *v.* Mussumut Sookheemoney Dassee, 14 Moore 289.

right of Shebaitship going with the right of inheritance to the family property (1).

It has been held in Calcutta, that the "consensus of the whole family might give the estate another direction," and the idol and its properties may be given away to another family for the purpose of carrying on the worship, if made for the benefit of the idol(2). The position does not seem to be at all clear except on the ground, that all the Shebaits, like all the trustees, may appoint new trustees. But trustees can renounce only under certain circumstances and according to certain procedure. Under English Law a trustee may renounce with the consent of all the parties interested in virtue of a special power contained in the instrument creating the trust or by application to the Court (3). But the position of the Calcutta High Court is not quite harmful as the transfer is valid only when made for the benefit of the idol. But what remedy is there when the property is misappropriated? If the rule laid down by West J. in Bombay that a trust for a Hindu idol and temple is always to be regarded as one created for public charitable or religious purposes within the meaning of Sec.

(1) Radha Mohun Mundul *v.* Jadoomonee Daasee, 23 W. R. 369 P. C. As regards the right of females to be appointed Shebaits, see Hari Dasi *v.* The Secretary of State, 5 Cal. 228 P. C. Konwar Doorganath Roy *v.* Ram Chunder Sen, 4 I. A. 52. Maharani Shibessowree Debia *v.* Mothoranath Acharya, 13 Moore 270.

(2) Khetter *v.* Hari, 17 Cal. 557 Sec. 12 Cal. 341.

(3) Lewin on Trusts, Ch. 25, p. 645.

539 C. P. C. be correct, there may be some solution of the difficulty. But that principle has not met with the approval of the Calcutta High Court. Under the English law, in all private trusts there is a beneficiary who can sue. Here the beneficiary is the family idol who can sue only through its Shebaits or managers. The Privy Council have held that the British Government by virtue of its sovereign power possesses, as the former rulers of the country did, the right to control all public religious endowments and charities. The king is to be considered *parens patriæ* and 'protector of every part of his subject.' The Advocate-General may sue on information in case of charities in the Presidency towns, (1) and the Legal Remembrancer in Allahabad. (2) In England, *relators* need not be personally interested.(3) The Bombay High Court have held that worshippers of an idol can bring a suit irrespective of Sec. 539 C. P. C., complaining of a breach of trust. (4) It is doubtful whether the rule applies to private debutter. There is no reason, however, why the crown should not have the power to redress breaches of trust about private debutter, as in cases of other trusts. Of course the Government will not

(1) Attorney General *v.* Brodie, 4 Moore 190. Mayor of Lyons *v.* The East India Comp ny, 1 Moore 175.
(2) 25 All, 631.
(3) Lewin on Trusts, p. 927.
(4) Radhabai *v.* Chimnaji, 3 Bom. 27. See 8 Bom. 452, 23 Mad. 28, 21 Bom. 48.

concern itself with the affairs of the gods but we have seen all Debutter is charitable in its character. The Brahmins say, it is for the benefit of Brahmins but the Shastras say, it is for the benefit of all beings. In case of large endowments, where the worship of the idol requires only a portion of the income of the dedicated property the rest must be considered dedicated for charitable purposes and the Crown should interfere to prevent misappropriation of it. In Calcutta, it has been held that in cases of private Debutters, a person, who would be the Shebait but for the existing Shebait may bring a suit for the removal of the latter on the ground of misconduct. (1) Even that would not remedy the evil. The Court has the power of removing and appointing new trustees. The question is who can move the Court to do so? Some provision should be made by the Legislature for the protection of private debutter. In England by 24 & 25 Vic. C. 96. Sec. 80, 86 a breach of trust has been made a criminal act. I am not sure whether a breach of trust by a Shebait would come under the Indian Penal Code. But some civil remedy ought to be given.

In a recent case, the Calcutta High Court have cited with approval the observations of West J. in Manohar Ganesh *v.* Lakshmiram that a trust for a Hindu idol must be regarded as

(1) 12 C. L. R. 370.

one created for "public purposes" and have further pointed out that the judgment was affirmed by the Privy Council (1).

It has been held in Calcutta that when the idol to which property had been dedicated had been alienated together with the property, a suit merely for the recovery of the property was not maintainable on the ground that the idol and the property could not be separated (2).

It is a maxim of English law that the execution of a trust should be under the control of the Court—Morice *v.* The Bishop of Durham, (9 Ves. 399.) The rule is applicable to trusts in India.

It has been held that when the original purpose fails or becomes impossible the donor or any other person may bring a suit for having the funds applied to a purpose of a similar kind. The *cypres* docrine has been held to be applicable to charities in India. (3) On failure of the objects of a trust a suit may be brought to have the funds applied to their original purpose or to one of a similar character. (4) If necessary, the Court will direct that a scheme should be prepared for the future management of the trust in the altered circumstances. (5)

(1) Shailajananda *v.* Umeshananda, 2 Cal. L. J. 472.
(2) Durga Prosad *v.* Sheo Prosad, 7 C. L. R. 278.
(3) Mayor of Lyons *v.* Advocate-General, 3 I. A. 32.
(4) Mohesh Chunder *v.* Kaylash, 11 W. R. 443.
(5) Chotalal *v.* Manohar Ganesh, 26 I. A. 199, 24 Bom. 50. See 11 W. R. 472, 23 W. R. 76, 3 Cal. 563, 5 Cal. 700.

It has been held by the Calcutta High Court that a suit lies for re-admission into caste and for declaration right to worship in the prayer halls of Assam Satras, by a Bhokut, who had been expelled by the majority of the Bhokuts and a decree was granted subject to the plaintiff conforming to the rules of the order, one of which was the payment of a fine before re-admission (1).

We next come to the rule of limitation as applicable to suits about endowments. Some writers have expressed an opinion that an idol is a perpetual minor. The one consequence that will follow from this position is that there can be no limitation in suits concerning debutter property. The proposition is not maintainable and it has been held that suits for the recovery of endowed property alienated by a preceding Shebait are barred by 12 years' limitation. "It is true that the idol" to use the language of their Lordships of the Judicial Committee in the case of Prosonno Kumary *v.* Golab Chand (2. I. A. 145) "can hold property only in an ideal sense and that its acts relating to any property must be done by or through a manager or Shebait; but it does not follow that each succeeding manager gets a fresh start as far

(1) Jagannath Churn *v.* Akali Dassia, 21 Cal. 463. Contra, Advocate-General *v.* Haim Deyakar, 11 Bom. 185. See, Sudharm Patar *v.* Sudharam, 11 W. R. 457. Vengamuthu *v.* Pandaveswara Gurukul, 10 Bom. 233, 3 Cal. 390, 6 Mad. 151, 7 Bom. 323.

as the question of limitation is concerned upon the ground of his not deriving title from any previous manager." The succeeding Shebaits, as was observed in the case just referred to, "formed a continuing representation of the idol's property." (1) It has also been held that a suit to recover debutter property alienated by a deed by a *defacto* Shebait is governed by 12 years' limitation and not by 3 years' limitation under Art. 91 of the Limitation Act. Limitation it has been held does not run against a Mohunt or Shebait until after the death of his predecessor in office. (2)

There can be no limitation to recover trust property in the hands of an outgoing Shebait or Dharmakarta. A Shebait, a Mohunt, a Dharmakarta or a Sanyasi may be regarded as a trustee holding property on a specific trust and property may be followed in his hands without any limit of time, (3) being protected by Sec. 10 of the Limitation Act. If a suit against a Shebait is protected, a suit against his heirs, legatees or assignees without consideration would likewise be protected. It has been held that in the case of a person who gets into possession of property as *defacto* trustee, although his right as

(1) Nilmony Sing *v.* Jagobandhu Roy, 23 Cal. 536 Kannan *v.* Nilukandan, 7 Mad. 337.
(2) Piran *v.* Abdul Karim, 19 Cal. 203.
(3) Sethu *v.* Subramanya, 11 Mad. 274.

such has come to an end, his possession is not adverse to the *cesti que trust.* (1) It is only express trusts, and not implied or constructive trusts, that come under Section 10 of the Limitation Act. In the case of a void charitable trust, if it is an express trust, the trustee may plead limitation against the heirs of the grantor but not against the *cestui que trustent.*

It has been held that a suit to establish a personal right to manage or control the management of an endowment, unless the right of control constitutes an hereditary office or involves possession of immoveable property, is governed by six years' limitation (2). The same rule has been held to apply to suits to establish an exclusive right to worship an idol (3). But the Privy Council have held that a claim to have the custody of a portrait of an ancestor placed in the right hands and the conduct of its worship falls under Act 14 rather than Act 49 and thus in such suits, 12 years' and not 6 years' limitation would apply.(4)

Suits to recover endowed property in the adverse possession of a third party are governed by twelve years' limitation, and the death or removal of a trustee does not give a fresh start on the ground that the estate of a Shebait or a

(1) Sheoshankar *v.* Ram Shewak, 24 Cal. 77.
(2) Bulwantrao *v.* Puran Mull, 10 I. A. 90.
(3) Eshan Chunder *v.* Monmohinee, 4 Cal. 683, See 8 Cal. 807.
(4) Goswami Sre Gridhare *v.* Romonlalji, 17 Cal. 3, 17 I. A. 137.

Mohunt is a life-estate. The Privy Council in a recent case (1) have held that "there is no distinction between the office and the property of an endowment and being of opinion that there can be no successive life estates disapproved of a Bombay decision (2) to the effect that the son of a co-shebait might come in notwithstanding Art 124 and Art 12 of the Limitation as it was supposed that each member succeeded *per forman doni.*

A suit for the removal of a Shebait or Mohunt of a public endowment, whose office is not hereditary and who is appointed by nomination or election, is barred by six years' limitation. It has been held that a Mohunt, who has been in possession for ten years could, by a suit, set aside alienations made by his predecessor and in such suit the defendants could not question his title as that had been perfected by six years' limitation, in as much as it was only within six years that a suit for his removal or for a declaration that his appointment was bad could be brought.(3) Where the office is a herediary one, the rule of 12 years' limitation applies and a suit to oust a Shebait is well within time, if brought within 12 years from the date on which he took up the management of the endowed property (4).

(1) Goana Sanbandha *v.* Velu, 27 I. A. 69.
(2) Trimback Bawa *v.* Bhan, 7 Bom. 188.
(3) Jogannath *v.* Birbhadra, 19 Cal. 711.
(4) Jogannath *v.* Ranjit, 25 Cal. 354.

A suit for the removal of a trustee and for the recovery of endowed property improperly alienated to a third party is governed by Art 134 of the Limitation Act and is maintainable if brought within 12 years from the date of alienation (1). When a person dedicated property for charitable purposes and appointed trustees for carrying out the objects of the trust who however, did not take charge but his son assumed the management, the son was considered to be a constructive trustee and a suit against him under Sec. 539 was held to be not timebarred, as every fresh breach of trust gave a fresh cause of action (2).

Decrees for or against a Mohunt or Shebait are *res judicata* and bind the successors of such Mohunt or Shebait, if they are obtained *bona fidæ*. But "the Court should be satisfied that the judgments relied on are untainted by fraud or collusion and that the necessary and proper issues have been raised tried and decided in the suits which led to them" (3). It has further been held that execution of judgments, against Shebaits when they are for money, should be decreed only against rents and profits of the Debutter property and not against the *corpus* of the property

(1) Sajedur Raja *v.* Gour Mohan Das, 24 Cal. 428.
(2) Jugal Kishore *v.* Lakshman Das, 23 Bom. 659.
(3) Prosonno Kumary *v.* Golab Chand, 2 I. A. 145.

THE END.

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